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ABSTRACT

This report focuses on issues relating to the development of individualized education programs for and placement of students who are classified as having mental retardation, learning disabilities, behavioral disabilities, or serious emotional disturbances. The U.S. Commission on Civil Rights examined present-day barriers and inequities that deny students with these types of disabilities an equal opportunity to participate in educational programs. The report analyzes and evaluates the Office for Civil Right's (OCR) implementation, compliance, and enforcement efforts for Section 504 of the Rehabilitation Act. It discusses other Federal disability laws, such as the Individuals with Disabilities Education Act (IDEA), and Title II of the Americans with Disabilities Act, to the extent that they relate to Section 504 and public elementary and secondary education for students classified as having mental retardation, learning disabilities, behavioral disabilities, or serious emotional disturbances. The Commission finds that, in general, Section 504, IDEA, and Title II of ADA have provided extensive protections to students with disabilities. In addition, OCR has developed a comprehensive and progressive program to implement and enforce Section 504. The report contains specific recommendations for further improving and strengthening OCR's Section 504 operations and promoting nondiscrimination and equal educational opportunity for students with disabilities. (CR)

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ED 415 599

Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504

Equal Educational Opportunity Project Series
Volume II

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September 1997

A Report of the United States Commission on Civil Rights

EC 306065

U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices;
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin;
- Submit reports, findings, and recommendations to the President and Congress;
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504

Equal Educational Opportunity Project Series
Volume II

September 1997

A Report of the United States Commission on Civil Rights

Letter of Transmittal

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The United States Commission on Civil Rights transmits this report, *Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504*, pursuant to P.L. 103–419. The report is the result of the Commission's long-standing commitment to ensuring that the Nation's public schools are free of discrimination and that all children in this country are afforded equal educational opportunity. The purpose of the report is to evaluate the efforts of the U.S. Department of Education and its Office for Civil Rights (OCR) to enforce Section 504 of the Rehabilitation Act of 1973.

The first volume in the *Equal Educational Opportunity Project Series* evaluated and analyzed OCR's history, performance, regulations, policies, and activities, setting the stage for the remaining volumes II through VI. With this second volume in the series, the Commission focused on issues relating to the development of individualized education programs for and placement of students classified as having mental retardation, learning disabilities, behavioral disabilities, or serious emotional disturbances. It examined, within the context of educational practices, present-day barriers and inequities that deny students with those types of disabilities equal opportunity to participate in educational programs, to maximize their learning potential, and to enhance their educational and career opportunities. For example, some of these barriers and inequities include the mislabeling of disabled students and the relative lack of access to nonacademic and nondiscriminatory counseling services.

The report analyzes and evaluates OCR's implementation, compliance, and enforcement efforts for Section 504. It discusses other Federal disabilities laws, such as the Individuals with Disabilities Education Act and Title II of the Americans with Disabilities Act, to the extent they relate to Section 504 and public elementary and secondary education for students classified as having mental retardation, learning disabilities, behavioral disabilities, or serious emotional disturbances.

The report provides findings and recommendations on OCR's Section 504 implementation, compliance, and enforcement efforts. The Commission finds that, in general, overall, Section 504, the Individuals with Disabilities Education Act, and Title II of the Americans with Disabilities Act have provided extensive protections to students with disabilities. In addition, OCR has developed a comprehensive and progressive program to implement and enforce Section 504. However, the report contains specific recommendations for further improving and strengthening OCR's Section 504 operations and promoting nondiscrimination and equal educational opportunity for students with mental retardation, learning disabilities, behavioral disabilities, and serious emotional disturbance.

For nondiscrimination and equal educational opportunity to be assured in our Nation's public schools, it is essential that the Department of Education work hand in hand with school administrators, teachers, students, parents, and the community at large. The Commission's intention, with the report,

is to assist the Department of Education in its efforts to strengthen its partnership with all of these groups and thereby enhance the Department's Section 504 civil rights enforcement program.

Respectfully,
For the Commissioners

Mary Frances Berry

Mary Frances Berry
Chairperson

Preface

This report is the second to be published as part of the Commission's Equal Educational Opportunity Project Series, which focuses on the opportunities available to students in American public elementary and secondary education. As stated in the Commission's approved project narrative, the purpose of this project is to "evaluate the efforts of the [U.S.] Department of Education [(DOEd)] and its Office for Civil Rights [(OCR)] to enforce a variety of laws mandating equal educational opportunity, with particular attention to the education offered language minority children; to programs provided to children with disabilities; to the math and science education of girls; and to tracking of minority children."[1]

The Commission has sought to identify key issues faced by students *within public schools and classrooms*.[2] In meeting that task, the Commission focused on several issues for this project series, including:

(1) development of individualized education programs for and placement of students classified as having mental retardation, learning disabilities, behavioral disabilities, or serious emotional disturbances; and

(2) development of educational programs for and placement of students with limited English proficiency (LEP).

The issues encompass educational practices that exist currently in America's schools. They serve as avenues for exploring some of the present-day barriers and inequities that deny some students equal opportunity to participate in educational programs, to maximize their learning potential, and to enhance their educational and career opportunities. Such issues are of great concern to parents and students. From the early 1990s and continuing to the present, DOEd and OCR have given such issues priority in conducting educational research and performing civil rights compliance and enforcement activities. As this report will discuss in detail, some of these barriers and inequities include the mislabeling of disabled students and the relative lack of access to nonacademic and nondiscriminatory counseling services.

Based on a review of literature, law, and policies, the Commission has identified five major principles that affect equal access to a quality education:

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[1] U.S. Commission on Civil Rights, *Equal Educational Opportunity Project, Project Proposal*, p. 3. Based on the approved project proposal, the Equal Educational Opportunity Project Series addresses the following civil rights and program statutes:

(1) Title IV of the Civil Rights Act of 1964;
(2) Title VI of the Civil Rights Act of 1964;
(3) Title IX of the Education Amendments of 1972;
(4) Section 504 of the Rehabilitation Act of 1973;
(5) Equal Educational Opportunities Act of 1974 (EEOA); and
(6) Education for All Handicapped Children Act of 1975 (renamed the Individuals with Disabilities Education Act (IDEA)). Ibid.

The Commission recognizes that the U.S. Department of Education's Office for Civil Rights (OCR) does not have responsibility for enforcing the EEOA or the IDEA. The project reports discuss these laws only as they relate to OCR's responsibilities. OCR also enforces Title II of the American's with Disabilities Act, which incorporates the substantive requirements of section 504 with respect to educational services to elementary and secondary students. References to OCR's enforcement of section 504 include enforcement of Title II, unless otherwise noted. The project narrative requires the Commission to evaluate educational practices and policies as they relate to DOEd's civil rights enforcement efforts. It also requires a focus on areas that improve the quality and distribution of educational opportunities. The Commission has undertaken the project to produce a series of reports benefiting varied readership, including the President, Congress, DOEd, State and local education agencies, the general public, parents, and, most important, students in America's public elementary and secondary schools.

[2] Although private schools have a long tradition in the United States, this report's focus is on public elementary and secondary schools.

(1) structuring educational programs to serve a diverse student population by maintaining a primary objective to place students in regular classes and core academic curricula to the greatest extent possible; grouping students to reflect different abilities in various subjects; and reevaluating and regrouping students periodically to reflect different abilities in various subjects and changes in achievement, performance, and development;

(2) utilizing neutral and nondiscriminatory diagnostic and screening procedures when placing students in educational programs;

(3) providing parental notification and ensuring that institutional programs facilitate and encourage the involvement of parents in their children's education;

(4) evaluating and allocating teachers, facilities, and other resources among educational programs; and

(5) eliminating barriers, providing access to all subjects, activities, and career opportunities and counseling each student to maximize his or her potential opportunities.

The Commission's approved project proposal specified that for each principle:

> the study will determine what information DOEd collects concerning the jurisdiction's educational system (e.g., education programs, resources, diagnostic evaluation methods, teacher and pupil assignment policies, self-evaluation methods), whether DOEd draws upon existing education research (i.e., relating to alternative approaches to serving disadvantaged students), and how DOEd uses this information to determine compliance with the laws. Based on DOEd's record and a review of education research in selected areas, the study will seek to identify ways that enforcement efforts can provide more equal educational opportunities by ensuring that the jurisdictions, found in violation of a law, take effective steps toward eliminating inequalities.

Research groups, educators, and other professionals have conducted studies and published articles on many of the issues and principles examined in the project series. However, to date, no one project has addressed all in a comprehensive and integrated fashion. As an independent, bipartisan agency, the Commission has undertaken the Equal Educational Opportunity Project Series to study the topics mentioned and present its findings and recommendations in a comprehensive series of enforcement reports. The reports discuss steps taken by the Federal Government, State and local education agencies, and schools to prevent discrimination and eliminate barriers to equal educational opportunity. Furthermore, the Commission's reports strive to promote nondiscrimination and equal educational opportunity by discussing criteria for evaluating educational practices from a civil rights perspective. By providing information on such civil rights criteria, the Commission hopes to support the efforts of the Federal Government, States, local schools, parents, teachers, and students as they work together to promote equal educational opportunities for all students.

In the project series the Commission evaluates OCR's implementation, compliance, and enforcement efforts at several levels—(1) headquarters, (2) regional, (3) State, and (4) local. The Commission has undertaken the following activities in preparing this report: (1) at the regional level, the Commission interviewed selected OCR regional offices;[3] (2) the Commission assessed OCR's procedures and organization at the headquarters and regional levels to determine whether they are sufficient and effective for the enforcement of civil rights laws for the project's focus issues; (3) the Commission reviewed OCR's policies and regulations implementing civil rights laws; (4) the Commission determined the extent to which those policies and regulations conform with civil rights laws; (5) the Commission reviewed OCR's efforts in conducting compliance reviews, complaint investigations, monitoring, and providing technical assistance, outreach, education, and training for the project's main issues; and (6) the Commission selected and analyzed five local school districts throughout the United States to serve as profiles (case studies) for the project.

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[3] The Commission conducted onsite and telephone interviews with staff members at OCR's Region IV office in Atlanta, GA. It conducted telephone interviews with staff members at the following other OCR regional offices: Region II—New York, NY; Region III—Philadelphia, PA; Region VI—Dallas, TX; Region VII—Kansas City, MO; Region VIII—Denver, CO; Region IX—San Francisco, CA; and Region X—Seattle, WA.

The first report in the series, *Equal Educational Opportunity Project Series, Volume I*, set the stage for the remaining reports. Because the civil rights laws addressed in the project cover DOEd's Federal financial assistance programs, the first report provided a summary of some DOEd funding programs. That report discussed national trends in education generally and trends relevant to issues discussed in the project series. It also analyzed and evaluated the history, performance, regulations, policies, and activities of OCR. That report served as the initial enforcement report in the project series, offering findings and recommendations on the overall implementation, compliance, and enforcement efforts of OCR relating to the four focus issues in public elementary and secondary schools.

The present report, *Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504*, is one of four enforcement reports in the series devoted to specific issues. This report focuses on educational opportunities afforded to students classified as having certain disabilities[4] — mental retardation, learning disabilities, behavioral disabilities, or serious emotional disturbances, as they relate to the development of individualized education programs for and placement of such students. The remaining reports will discuss the other issues respectively.

The reports serve as statutory enforcement reports, offering findings and recommendations on specific activities of OCR. Each report discusses the educational and civil rights perspectives on the issues and principles. Each summarizes the works of educational experts addressing their theories, research, assessments, and opinions. Each report also describes educational practices and presents a wide range of viewpoints held by educators and other professionals on such practices. To the extent DOEd or OCR has encouraged or recommended certain educational practices as consistent with civil rights initiatives, the reports discuss DOEd's and OCR's activities to support the practices. The reports then assess the implementation, compliance, and enforcement of civil rights laws by OCR. The reports analyze activities at OCR's headquarters and regional levels to determine the extent and quality of its efforts. The reports also assess the standards created by OCR to ensure and promote nondiscrimination in federally assisted and conducted educational programs. By integrating an understanding of both educational practices and civil rights enforcement within the body of the reports, the Commission emphasizes the importance of providing both educational equity and educational excellence to all students regardless of race, color, national origin, gender, or disability.

Over the past few decades increasing numbers of students have been identified as having the disabilities discussed in this report, and the medical and education communities have begun only recently to understand the causes and treatments of these disabilities and to develop techniques for educating students with these disabilities. In the process, it has become evident that providing equal educational opportunity for students with mental retardation, learning disabilities, behavioral disabilities, and serious emotional disturbance raises complex educational and civil rights compliance issues. The presence of these disabilities often remains unknown to families and individuals who have these disabilities until they are diagnosed. In addition, such disabilities are not immediately evident to observers. As a result, these disabilities often create a particular stigma that reflects great controversy as to diagnosis, treatment, interaction with other students, and appropriate educational programs. The disabilities discussed in this report have raised many issues that school communities, families, and education researchers have only very recently begun to address. These issues present legal, policy, civil rights, and educational perspectives relating to these disabilities. In many respects, these issues are very different from those faced by the broader community of students with disabilities. Because of the complexity and uniqueness of the civil rights issues facing students with mental retardation, learning disabilities, behavioral disabilities, and serious emotional disturbance, the report's scope was narrowed to focus primarily on them, rather than attempting to cover the civil rights issues facing the entire community of students with disabilities. However, where civil rights issues facing students with other disabilities, such as physical disabilities, overlap with those facing students with mental retardation, learning disabilities, behavioral disabilities, and serious emotional disturbance, the report addresses these issues as well.

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[4] The selected disabilities are physical or mental impairments that are not readily apparent to others. They often cannot be readily known without the administration of appropriate diagnostic tests. U.S. Department of Education, Office for Civil Rights, *The Civil Rights of Students with Hidden Disabilities under Section 504 of the Rehabilitation Act of 1973*, 1995 (pamphlet).

With the present report, the Commission intends to promote accurate identification of students with mental retardation, learning disabilities, behavioral disabilities, and serious emotional disturbance; appropriate education meeting the specific needs of each of those students; and access to regular education classes, gifted and talented programs, or other opportunities for education and advancement, if appropriate for each student. Overall, the report analyzes OCR's efforts to implement, ensure compliance with, and enforce section 504 in public elementary and secondary education. The report places emphasis on the section 504 regulation requirement to provide a free appropriate public education to persons with disabilities. OCR has focused on mental retardation, learning disabilities, behavioral disabilities, and serious emotional disturbances in assessing section 504 problems in identifying students. Consequently, the report addresses OCR's work in the context of developing individual educational programs for and placing students with mental retardation, learning disabilities, behavioral disabilities, and serious emotional disturbance. The Individuals with Disabilities Education Act and the Americans with Disabilities Act also have played major roles in advancing the education of children and youths with disabilities. Therefore, those laws are discussed in the report as they relate to OCR's work under section 504. The report provides a basis for showing how OCR has incorporated educational standards and principles into its section 504 enforcement efforts. It also analyzes how OCR has worked to promote equal educational opportunity for students with mental retardation, learning disabilities, behavioral disabilities, and serious emotional disturbance.

Acknowledgments

This report was prepared under the direction and supervision of Frederick D. Isler, Assistant Staff Director for Civil Rights Evaluation. The report was written by the staff of the Office for Civil Rights Evaluation, including Andrea Baird, Social Scientist; David Chambers, Civil Rights Analyst; John Dill, Supervisory Civil Rights Analyst;* Wanda Johnson, Civil Rights Analyst; Eric Mann, Civil Rights Analyst; Christine Plagata-Neubauer, Civil Rights Analyst;* and Nadja Zalokar, Supervisory Civil Rights Analyst. Ilona Turner, Equal Opportunity Assistant, and LaTasha Greer and Renee Enochs, Patricia Roberts Harris Interns, assisted with research for this report. Barbara Fontana and Vanessa Williamson also assisted in obtaining research materials. The legal review was performed by Lillian Moyano Yob, Attorney Advisor. Michelle Leigh Avery and Rebecca Kraus, Civil Rights Analysts, provided editorial assistance. Editorial review was provided by Edward Darden, Betty Edmiston, and William F. Lee. Gloria Hong provided editorial assistance and supervised the production of the report, under the direction of Carol-Lee Hurley.

* No longer with the Commission.

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Chapter 1

Introduction

Over the past 30 years, this country has seen major changes improving the education of students with disabilities. Once a system altogether excluding persons with disabilities or neglecting their educational needs,[1] public education now is required to consider educational rights and responsibilities and assure a free appropriate education for persons with disabilities. The change has come about through advocacy on behalf of children and youths with disabilities and a heightened awareness of disability issues over the last 25 years, leading to enactment of several Federal laws assuring rights and protections to persons with disabilities.

In public elementary and secondary education, two pieces of legislation have profoundly affected the education of children with disabilities: Section 504 of the Rehabilitation Act of 1973[2] and the Individuals with Disabilities Education Act (IDEA), which originally was enacted as the Education for All Handicapped Children Act[3] and renamed IDEA in 1990.[4] Section 504 prohibits exclusion from participation in, denial of the benefits of, or discrimination under any federally

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[1] *See, e.g.*, S. Rep. No. 94–168, at 8 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1432 (noting "the parents of a handicapped child or a handicapped child himself must still too often be told that adequate funds do not exist to assure that child the availability of a free appropriate public education"); H. Rep. No. 93–805 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4093, 4137 ("In 1966, hearings before an ad-hoc Subcommittee of the Education and Labor Committee detailed the educational needs of handicapped children. Only about 1/3 of approximately 5.5 million children were being provided with an appropriate specialized education. The remaining two-thirds were excluded from schools, or sitting idly in regular classrooms awaiting the day they would be old enough to drop out."). *See* chap. 2, pp. 10–21, for a discussion of the history of public education for children and youths with disabilities in America.

[2] Pub. L. No. 93–112 § 504, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (1994)).

[3] Pub. L. No. 94–142, 89 Stat. 773 (as amended), *renamed* the Individuals with Disabilities Education Act, Pub. L. No. 101–476, 104 Stat. 1143 (codified as amended at 20 U.S.C. §§ 1400–1485 (1994)) *amended by* the IDEA Amendments of 1997, Pub. L. No. 105–17).

[4] Pub. L. No. 101–476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400–1485 (1994)) *amended by* the Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105–17.
More than a decade after creation of these laws in the 1970s, there were still concerns among those with disabilities and disability advocates that not enough was being done to ensure equal access for individuals with disabilities. On July 26, 1990, the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101–336, 104 Stat. 327, was signed into law. Although neither the ADA nor its regulations expressly cover public elementary and secondary education programs, the Federal Government has construed Title II of the ADA as covering the discriminatory conduct in education programs specifically prohibited under section 504. Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, Nov. 19, 1992, *reprinted in* 19 IDELR 859, 860. For children and youth with physical and mental disabilities, this has provided them with an additional protection against discrimination in public elementary and secondary schools.

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assisted program or activity because of a person's disability.[5]

The IDEA, a Federal program statute,[6] creates substantive and procedural rights for children and youths with disabilities and their parents as a condition to receiving IDEA State grant (Part B) funds.[7] The four basic rights created in the IDEA in 1990 and reiterated in the IDEA Amendments of 1997 are: (1) each child with a disability has a right to a free public education appropriate to the child's unique needs, regardless of the severity or type of disability;[8] (2) each child with a disability must be educated in the least restrictive environment possible;[9] (3) each child with a disability is entitled to an individualized education program;[10] and (4) the parents or guardians of each child with a disability is guaranteed due process rights in the evaluation and placement of the child.[11]

The IDEA requires, for example, that State recipients provide for the development and implementation of "[a]n individualized education program or an individualized family service program. . .developed, reviewed, and revised for each child with a disability";[12] and provide "an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child."[13]

Section 504 and the IDEA and their respective implementing regulations have been the most influential pieces of Federal legislation and policy to effect positive change in the education of students with disabilities. They have offered a means for such students to gain equal access to the curricula, classes, activities, and services available to nondisabled students. They have provided students with disabilities the right to a free appropriate education in the regular education environment unless the needs of the students require a different setting. In addition, they have given students with disabilities, and their parents, procedural rights to ensure proper identification, evaluation, and placement, and the provision of an appropriate public education. With enactment of section 504 and the IDEA, children and youths with disabilities now have a right to a free public education and a right to be included in regular schools and classes with nondisabled students to the greatest extent possible.[14] Contemporary discussions have moved beyond securing the right to public education for students with disabilities to defining what will provide those students with equal educational opportunity and what will assure nondiscrimination within the school and classroom.

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[5] Section 504 states in part: "No otherwise qualified individual with a disability in the United States, . . . shall be denied, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794(a) (1994).

[6] The IDEA also is a civil rights statute in that it guarantees a free appropriate public education and equal educational opportunity for students with disabilities. However, the main focus of this report is on civil rights implementation, compliance, and enforcement activities relating to section 504.

[7] IDEA Amendments of 1997, Pub. L. No. 105–17, §§ 611–619.

[8] *Id.*, §§ 602(8), 612(a)(1) (1997).

[9] *Id.*, § 612(a)(5) (1997).

[10] *Id.*, § 612(a)(4) (1997).

[11] *Id.*, § 615 (1997).

[12] *Id.*, § 612(a)(4) (1997).

[13] *Id.*, § 615(b)(1) (1997).

[14] The right to a free appropriate public education (FAPE) is found in the statutory provisions of the IDEA Amendments of 1997, Pub. L. No. 105–17, § 612(a)(1) (1997); and in the U.S. Department of Education's regulation implementing section 504 at 34 C.F.R. § 104.33(a) (1996).

The regulations implementing section 504 outline criteria for what constitutes compliance with section 504 and, thus, nondiscrimination under that law. The criteria address many educational practices including the identification, evaluation, reevaluation, placement, and counseling of students with disabilities. They also deal with topics such as parental notification, opportunity for parental involvement, and provision of trained teachers and comparable facilities and services to students with disabilities.[15] In view of the rulemaking history of section 504, it is clear that the intent behind the regulations was to create consistency with provisions in the IDEA and the standards set forth in court cases requiring free appropriate public education, access to regular schools and classes, and participation in schools with nondisabled students.[16] Judicial, legislative, and rulemaking history reveals that the concepts ultimately incorporated into the section 504 regulations were based on extensive input from teachers, school administrators, parents, scholars, and advocates.[17] Thus, the regulations reflect what these groups considered, at the time, as sound educational practices crucial to ensuring nondiscrimination in schools and equal educational opportunity for students with disabilities.

A contemporary analysis of section 504 therefore requires attention to current educational practices and perspectives in public elementary and secondary schools. Much has changed in the education of students with disabilities since the enactment of section 504 in 1973 and the creation of the section 504 regulations in 1977. Therefore, it is important to consider whether the protections set forth in the section 504 statute and its regulations remain responsive to educational issues today.

A number of contemporary educational issues have involved the education of students with disabilities generally, and, specifically students with mental retardation, learning disabilities, behavioral disabilities, and emotional disturbance.[18] For example, there has been continued concern about misidentification of students with emotional and behavioral disabilities.[19] Researchers and scholars have identified a number of factors contributing to misidentification. The factors include problems in defining disabilities such as attention deficit disorder, mental retardation, and emotional disturbance.[20] Compounding this problem is the fact that there is no single standard for defining these disabilities. These factors also include problems inherent in certain screening, referral, and evaluation methods.[21] Another concern is that some students with certain types of disabilities, such as emotional disabilities and mental retardation, do not have access to regular classes in neighborhood schools.[22]

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[15] *See* 34 C.F.R. §§ 104.32–104.37 (1996).

[16] *See* 42 Fed. Reg. 22,676, 22,690 (1977) (Notice of Proposed Rulemaking); 41 Fed. Reg. 20,301–20,302 (1976) (Notice of Intent to Issue Proposed Rules). The court cases include *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972). For a discussion on these cases, *see* chap. 2, pp. 18–21. See also *Lebanks v. Spears*, 60 F.R.D. 135 (E.D. La. 1973).

[17] *See* Pub. L. No. 93–112, title v, § 504, 87 State 394; *see also* Pub. L. No. 94–142, § 5(a), 89 Stat. 781; 42 Fed. Reg. 22,676 (1977) (discussing section 504 rulemaking history and public comments received).

[18] These disabilities are physical or mental impairments that are not readily apparent to others. They often cannot be readily known without the administration of appropriate diagnostic tests. U.S. Department of Education (DOEd), Office for Civil Rights (OCR), *The Civil Rights of Students with Hidden Disabilities under Section 504 of the Rehabilitation Act of 1973*, 1995 (pamphlet).

[19] *See, e.g.*, H. Rep. No. 101–544, at 39–41 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1761–64; Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 Tenn. L. Rev. 295, 303–305, Winter 1993; The Council for Children with Behavioral Disorders, "Best Assessment Practices for Students with Behavioral Disorders: Accommodation to Cultural Diversity and Individual Differences," *Behavioral Disorders*, vol. 14, no. 4 (April 1989), pp. 263–78, *reprinted in* Reece L. Peterson and Sharon Ishii-Jordan, *Multicultural Issues in the Education of Students with Behavioral Disorders* (Cambridge, MA: Brookline Books, 1994), p. 266.

There also are questions regarding the effectiveness of educational programs in addressing the many needs of students with mental retardation, learning disabilities, behavioral disabilities, and emotional disturbance in various subject areas. For example, some argue that schools are not responsive enough to the dual needs of students with these disabilities who also are gifted or have limited proficiency in English.[23] There also are concerns about the usefulness and effectiveness of current reevaluation practices.[24] In addition, reports indicate that providing a free appropriate education for students with disabilities in the regular class has, for many school systems, been a challenge given the realities of limited resources and the unwillingness of some school administrators, teachers, and parents to support regular education placements.[25]

Another concern is that parental involvement in their children's education may actually be hindered by several obstacles, including the complex system of procedural requirements and rights established by Federal laws and regulations and the technical nature of diagnosing disabilities and identifying appropriate instructional methods.[26] Finally, there are concerns about the effects of applying labels to students with mental retardation, learning disabilities, behavioral disabilities, and emotional disturbance and concerns that such students may be foreclosed from pursuing all curricular options and careers available to nondisabled students.[27] These are only some of the contemporary issues discussed and debated in current educational literature, some of which Congress has attempted to address with its enactment of the IDEA reauthorization, the IDEA Amendments of 1997.

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[20] *See, e.g.*, John W. Maag and Robert Reid, "Attention-Deficit Hyperactivity Disorder: A Functional Approach to Assessment and Treatment," *Behavioral Disorders*, vol. 20, no. 1 (1994), pp. 7–8; William Frankenberger and Kathryn Fronzaglio, "States' Definitions and Procedures for Identifying Children with Mental Retardation: Comparison Over Nine Years," *Mental Retardation*, vol. 22, no. 6 (December 1991), p. 320; Eli M. Bower, "Defining Emotional Disturbance: Public Policy and Research," *Psychology in the Schools*, vol. 19 (1982), pp. 58–60.

[21] *See, e.g.*, Robert G. Simpson, "Agreement Among Teachers of Secondary Students in Using the Revised Behavior Problem Checklist to Identify Deviant Behavior," *Behavioral Disorders*, vol. 17, no. 1 (November 1991), p. 71.

[22] *See* Robert O'Harrow, Jr., "Parents Challenge Fairfax Schools," *The Washington Post*, Oct. 16, 1996, pp. D1, D7 (Parents of 10 students with disabilities filed discrimination complaints with OCR and the Virginia Department of Education against Fairfax County Schools, alleging that the school system violates Federal civil rights laws by segregating their children in classrooms far from their neighborhoods.).

[23] *See generally* J.H. Humphrey, *Helping Learning-Disabled Gifted Children Learn Through Compensatory Active Play* (Springfield: Charles C. Thomas, 1990); L.H. Fox and D. Tobin, *Learning Disabled / Gifted Children: Identification and Programming* (Baltimore: University Park Press, 1983), p. ix; P.R. Daniels, *Teaching the Gifted / Learning Disabled Child* (Rockville, MD: Aspen Publication, 1983); A. Udall, Chapter review in J.R. Whitmore and C.J. Maker, *Intellectual Giftedness in Disabled Persons* (Rockville, MD: Aspen Publication, 1985); Anne C. Willig and Hinda F. Greenberg, eds., *Bilingualism and Learning Disabilities: Policy and Practice for Teachers and Administrators* (New York: American Library Publishing Co., Inc., 1986); Leonard M. Baca and Hermes T. Cervantes, *The Bilingual Special Education Interface* (Columbus, OH: Merrill Publishing Co., 1989). *See also* Caroline M. Bredekamp, "The Gifted/Learning Disabled Student: A Contradiction in the Classroom" (Master's thesis, University of Northern Iowa, July 1993) (reviewing literature concerning identification processes and appropriate learning strategies for gifted/learning disabled students).

[24] *See generally* National Association of State Directors of Special Education, "Reauthorization of the Individuals with Disabilities Education Act: Issues and Perspectives. Policy Forum Report" (Washington, DC: Project FORUM, September 1994); John E. Brandt, "Triennial Reevaluation of Special Needs Students: A Review of Best Practices and Other Considerations" (paper presented at the Annual Convention of the National Association of School Psychologists, Washington, DC, April 1993); Harvey F. Clarizio, and Douglas W. Halgren, "Continuity in Special Education Placements: Are Reevaluations Really Necessary?" *Psychology in the Schools*, vol. 28, no. 4 (October 1991), pp. 317–24.

[25] *See, e.g.*, Ray Van Dyke, Martha Ann Stallings, and Kenna Colley, "How to Build an Inclusive School Community: A Success Story," *Phi Delta Kappan* (February 1995), p. 477; Richard H. Good, III, Kathleen Rodden-Nord, and Mark R. Shinn, "Effects of Classroom Performance Data on General Education Teacher's Attitudes Toward Reintegrating Students with Learning Disabilities," *School Psychology Review*, vol. 21, no. 1 (1992), p. 139.

Many of these issues have served as the focus of complaints of discrimination under section 504. For example, in fiscal year 1995, the U.S. Department of Education (DOEd) Office for Civil Rights (OCR) received 1,620 elementary and secondary education complaints that raised issues involving the evaluation/classification of students with physical or mental impairments, placement/referral, educational setting, individualized education plan services, or overrepresentation in special education.[28]

In the past, the U.S. Commission on Civil Rights (Commission) has addressed some of the contemporary problems associated with achieving the goals of equal educational opportunity and nondiscrimination for students with disabilities. The Commission and its State Advisory Committees have published several reports addressing this subject.

For example, in 1983 the Commission released a clearinghouse report entitled *Accommodating the Spectrum of Individual Abilities*, which examined discrimination faced by individuals with disabilities in a variety of social contexts, including employment and medical treatment, as well as education. The Commission found that, despite some improvements, discrimination against individuals with disabilities continued to be a "serious and pervasive social problem."[29]

Several of the Commission's State Advisory Committees specifically have addressed equal educational opportunity and nondiscrimination for individuals with disabilities. As early as 1977, the California Advisory Committee conducted a study of the State's responsibility to monitor educational programs for students classified as mentally retarded. In its report, *Evaluation of Educable Mentally Retarded Programs in California*, the California Advisory Committee found that the State had failed to monitor its programs effectively and that minority students were overrepresented in programs for students with mental retardation.[30] In 1982, the Illinois Advisory Committee published a handbook for parents, written in both English and Spanish, to help parents learn about their rights under the Education for All Handicapped Children Act, now known as the IDEA. The handbook, entitled *The ABCs of Special Education*, described special education programs and addressed issues associated with testing, student records, school facilities, State responsibilities, costs, and filing complaints.[31] In 1993, the North Dakota Advisory Committee released a report entitled *Native American Students in North Dakota Special Education Programs*. The report was designed to provide a greater understanding of the extent to which Native American students receive an equal educational opportunity in North Dakota's special education programs.[32]

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[26] *See, e.g.*, National Council on Disability, *Improving Implementation of the Individuals with Disabilities Education Act* (May 1995), p. 57 (comments of Kathy Davis at Des Moines, Iowa field hearing, noting how complexities of the IEP process hinder parental involvement); Beth Harry, Norma Allen, and Margaret McLaughlin, "Communication Versus Compliance: African-American Parents' Involvement in Special Education," *Exceptional Children*, vol. 61 (February 1995), p. 364 (noting that, in a study on parental participation, most parents said they had trouble reading the documents provided by the school because the documents used terminology they did not understand).
The 1997 amendments to the IDEA made changes to IDEA's procedural safeguards, some of which appeared to address these concerns, including changes to "simplif[y] the process of delivering, and the content of, notices to parents about their child's rights." *See* Pub. L. No. 105–17 § 615; S. Rep. No. 105–17, at 25 (1997).

[27] *See, e.g.*, Bill R. Gearheart, *Special Education for the '80s* (St. Louis: The C.V. Mosby Co., 1980), p. 64 (citing N. Hobbs, *The Futures of Children* (San Francisco: Jossey-Bass Publishers, 1974)); Alan Gartner and Dorothy Kerzner Lipsky, "Beyond Special Education: Toward a Quality System for All Students," *Harvard Educational Review*, vol. 57, no. 4 (November 1987), p. 381; Colleen M. Fairbanks, "Labels, Literacy, and Enabling Learning: Glenn's Story," *Harvard Educational Review*, vol. 62, no. 4 (Winter 1992), pp. 475–93; Harlan Hahn, "The Politics of Special Education," in Dorothy Kerzner Lipsky and Alan Gartner, eds., *Beyond Separate Education: Quality Education for All* (Baltimore, MD: Paul H. Brookes Publishers, 1989), p. 230.

[28] *See* U.S. Commission on Civil Rights, *Equal Educational Opportunity Project Series, Volume I* (December 1996), chap. 5, table 5.9 (hereafter cited as U.S. Commission on Civil Rights, *Equal Educational Project Series, Volume I*).

[29] Ibid., p. 159.

In 1996, the Commission released *Equal Educational Opportunity Project Series, Volume I*, a precursor to this report. Volume I is the initial statutory enforcement report in a series discussing implementation, compliance, and enforcement of civil rights laws relating to four focus issues in public elementary and secondary education. The report examines the Federal agency with the primary responsibility for issues related to education, the U.S. Department of Education (DOEd), and the DOEd office responsible for civil rights matters, the Office for Civil Rights (OCR). One of the issues addressed in Volume I is the development of individualized education programs for and placement of students classified as having mental retardation, learning disabilities, behavioral disabilities, or emotional disturbances.[33] In reporting on civil rights implementation, compliance, and enforcement on that issue, the report discusses OCR's efforts related to section 504 from a general perspective. Among the Commission's findings, the report indicates that OCR's section 504 regulations "provide a solid foundation for OCR's section 504 program"[34] and "much detail on the requirements for ensuring nondiscrimination."[35] In addition, OCR "has a strong record for developing section 504 policy" in that it has produced numerous internal section 504 policy memoranda and policy guidance documents.[36]

With *Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504*, the Commission takes a closer look at section 504, OCR's implementation, compliance, and enforcement of that law, and the regulatory requirement to provide a free appropriate public education to persons with disabilities. The report's purpose is to evaluate Federal enforcement of section 504 as it relates to development of individualized education programs for and placement of students classified as having mental retardation, learning disabilities, behavioral disabilities, or emotional disturbance.

As a background, the report provides a brief history on the education of students with disabilities, emphasizing the educational opportunities for persons with mental retardation, learning disabilities, behavioral disabilities, or emotional disturbances. The history covers both educational programs offered to students with those disabilities and initiatives of parents, advocacy groups, Congress, DOEd generally, and OCR, specifically, to promote equal educational opportunity for students with those disabilities.

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[30] U.S. Commission on Civil Rights, California Advisory Committee, *Evaluation of Educable Mentally Retarded Programs in California* (May 1977), p. 19.

[31] U.S. Commission on Civil Rights, Illinois Advisory Committee, *The ABCs of Special Education: A Handbook for Parents* (March 1982).

[32] *See* U.S. Commission on Civil Rights, North Dakota Advisory Committee, *Native American Students in North Dakota Special Education Programs* (April 1993), preface.

[33] The other issues are (1) development of education programs for and placement of students with limited English proficiency; (2) difficulties faced by female students in gaining equal access to mathematics and science courses and programs; and (3) ability grouping and tracking of students. *See* U.S. Commission on Civil Rights, *Equal Educational Opportunity Project Series, Volume I* (December 1996), chap. 1, pp. 3–4 (discussing these issues).

[34] Ibid., chap. 6, p. 254.

[35] Ibid., chap. 6, p. 256.

[36] Ibid., chap. 6, p. 257.

The report analyzes civil rights from a policy perspective. It examines Federal enforcement of section 504 in the context of specific principles that advance equal educational opportunity and promote nondiscrimination. In keeping with the Equal Educational Opportunity Project Series' focus on within-school and within-classroom educational experiences, the Commission sought to identify principles crucial to promoting nondiscrimination and equal educational opportunity. Researchers have identified services and initiatives critical to the educational development and achievement of students with disabilities, and the special needs of poor and minority students. In addition, legislation and policymaking have favored regular education placements, recognizing an efficacy in educating all students, including students with disabilities and students with limited English proficiency, in regular classes. The IDEA, for example, requires the inclusion of students with disabilities in classes with nondisabled students unless the nature or severity of disability is such that even with supplementary aids and services, education of that child cannot be achieved satisfactorily.[37] Drawing on research, legislation, and policy, the Commission identified the following principles to examine enforcement of civil rights laws:

(1) utilizing neutral and nondiscriminatory diagnostic and screening procedures when placing students in educational programs;

(2) structuring educational programs to serve a diverse student population by maintaining a primary objective to place students in regular classes and core academic curricula to the greatest extent possible; grouping students to reflect different abilities in various subjects; and reevaluating and regrouping students periodically to reflect different abilities in various subjects and changes in achievement, performance, and development;

(3) providing parental notification and ensuring that institutional programs facilitate and encourage the involvement of parents in their children's education;

(4) evaluating and allocating teachers, facilities, and other resources among education programs; and

(5) eliminating barriers, providing access to all subjects, activities, and career opportunities, and counseling each student to maximize his or her potential.

These principles are key components to structuring nondiscriminatory educational programs and advancing equal educational opportunity for all students. Congress has incorporated these principles into civil rights laws and program statutes, such as the IDEA[38] and the Elementary and Secondary Education Act of 1965.[39] All of the five principles which the Commission views as critical to the development and implementation of individual educational programs that ensure equal educational opportunity and nondiscrimination for students with disabilities, are noted by Congress in legislative history documents of the IDEA Amendments of 1997. For example, in the report accompanying the House bill, the Committee on Education and the Workforce noted that:

> [t]his authorization is viewed by the Committee as an opportunity to review, strengthen, improve IDEA to better educate children with disabilities and enable them to achieve a quality education by:

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[37] *See* Pub. L. No. 105–17, § 612(a)(5) (1997).

[38] *See id.*, § 612(a)(1); § 612(a)(5); § 612(a)(15); § 613(a)(3); § 614(a)(1), (2); § 614(a), (b); § 615; §§ 651–656; §§ 671–674; §§ 681–687 (1997).

[39] *See* 20 U.S.C. § 6301 *et seq.* (1994) (Title I Programs); 20 U.S.C. § 7231 *et seq.* (1994) (Women's Educational Equity Act Program); and 20 U.S.C. § 7401 *et seq.* (1994) (Bilingual Education Programs).

(1) Strengthening the role of parents;
(2) Ensuring access to the general education curriculum and reforms;
(3) Focusing on teaching and learning while reducing unnecessary paperwork requirements;
(4) Assisting educational agencies in addressing the costs of improving special education and related services to children with disabilities;
(5) Giving increased attention to racial, ethnic, and linguistic diversity to prevent inappropriate identification and mislabeling;
(6) Ensuring schools are safe and conducive to learning; and
(7) Encouraging parents and educators to work out their differences by using nonadversarial means.[40]

Moreover, DOEd included many of the principles in its regulations and policies for section 504 and Title VI of the Civil Rights Act of 1964.[41]

The report does not examine OCR's general process for civil rights implementation, compliance, and enforcement (i.e., OCR's organization, budget, staffing levels, and complaints and compliance procedures), which were addressed in volume I of the Equal Educational Opportunity Project Series. Instead, it discusses how OCR, in its section 504 policies and case analyses, has incorporated the five principles presented above. It also assesses whether the approach is effective for ensuring nondiscrimination and equal educational opportunity.[42]

In addition to discussing section 504 and OCR's work relating to that law, the report explores various educational practices and perspectives relating to students classified as having mental retardation, learning disabilities, behavioral disabilities, or emotional disturbance. It presents perspectives in educational literature, social science studies, and Federal law and policy. These perspectives are useful in explaining the significance of certain educational practices to section 504 compliance and to equal educational opportunity. They reveal certain problems or barriers that may limit educational opportunities for or result in discrimination against students with disabilities. In addition, they provide a measure to determine whether OCR is "draw[ing] upon existing education research" in implementing, ensuring compliance with, and enforcing section 504.[43]

The Commission believes that a primary concern in federally assisted educational programs should be the promotion of educational excellence for all students through guarantee of nondiscrimination and protection of students' rights under civil rights laws. A discussion of equal educational opportunity must incorporate both a regard for education and for civil rights, equal opportunity, and equal access.

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[40] H. Rep. No. 105–95, at 85 (1997); *see also* S. Rep. No. 105–17, at 5 (1997); Rep. Bill Goodling, Chairman, Committee on Education and the Workforce, Rep. Pete Hoekstra, Chairman, Subcommittee on Oversight and Investigations, Rep. Howard McKeon, Chairman, Subcommittee on Higher Education, Training and Lifelong Learning, and Rep. Frank Riggs, Chairman, Subcommittee on Early Childhood, Youth and Families, letter to the Honorable Bill Clinton, President of the United States, Feb. 4, 1997, p. 1 ("we intend to reform the Individuals with Disabilities Education Act. . . . We will continue to emphasize these themes: focusing on children's education instead of process and bureaucracy; giving parents increased participation in decision-making; and, giving teachers the tools they need to teach all children.").

[41] *See* 34 C.F.R. pt. 104 (1996); Michael L. Williams, Assistant Secretary for Civil Rights, OCR, DOEd, memorandum to OCR Senior Staff, "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP students)," Sept. 27, 1991.

[42] This is in keeping with the Commission's project proposal goals to (1) determine "whether [DOEd's] policies and regulations comport with existing law; and whether its policies, regulations or the law require revision or elaboration"; (2) "determine whether the education and enforcement measures taken by DOEd adequately ensure compliance with the laws"; (3) "evaluate DOEd's compliance standards . . .," focusing on "five areas that influence the quality and distribution of educational opportunities." Those five areas are (i) diagnostic and screening procedures for allocating students; (ii) the structure of educational programs designed to serve a diverse student population (including mainstreaming and remediation programs); (iii) the allocation of teachers, facilities and other resources among educational programs; (iv) institutional efforts to create a nurturing learning environment for disadvantaged students; and (v) institutional programs to facilitate/encourage the involvement of parents in their children's education. U.S. Commission on Civil Rights, "Equal Educational Opportunity Project, Project Proposal," pp. 3–4.

[43] As specified in the project proposal, this report also describes "how DOEd [and OCR] use[] this information in determining compliance with the laws." Ibid., p. 4.

In presenting civil rights and educational perspectives, this report acknowledges the relationship between educational practices and civil rights. To ensure fully that students with mental retardation, learning disabilities, behavioral disabilities, and emotional disturbance receive an education in public schools that is nondiscriminatory and that affords equal educational opportunity, it is important to understand educational practices and how they influence educational opportunities for such students. In addition, to create effective civil rights regulations and policies, it is important to incorporate sound educational principles and, thus, have provisions that are guidelines to nondiscriminatory education practices. The section 504 regulations reflect that association between education principles and civil rights.

By describing and recommending changes to section 504, the implementing regulations, and OCR's policies and analysis under section 504, this report will help to ensure compliance with existing case law, assist in reducing barriers to equal educational opportunity, and ensure that the law, regulations, and implementation and enforcement of section 504 respond to changes and innovations in existing education practices or perspectives. Because this report presents educational and civil rights perspectives, it is not intended solely for the civil rights community. Like *The ABCs of Special Education*, this report is, in many ways, a handbook for parents and educators. It informs them of (1) Federal requirements and rights in public elementary and secondary education for students with mental retardation, learning disabilities, behavioral disabilities, and emotional disturbance; (2) barriers that may limit the educational opportunities for students with these disabilities; and (3) practices that help to eliminate these barriers and ensure nondiscrimination in public educational programs and services. Consequently, in providing this information to parents, teachers, and administrators, this report will assist them in becoming more aware of problems limiting educational opportunities for students with mental retardation, learning disabilities, behavioral disabilities, and emotional disturbance. It also will improve their ability to eliminate or reduce such barriers and ensure full compliance with section 504's nondiscrimination provisions.

Chapter 2

Background

A Historical Perspective

Early America—Intolerance and Misunderstanding

Historically, individuals with disabilities in the United States, as in most other countries, confronted a society that had little understanding of or tolerance for those with physical, mental, and emotional disabilities. During the early colonial period, Europeans coming to America to establish a "new life" met the wilderness of an untamed country. To build a new life in an unknown land, early American settlers placed a premium on physical stamina and hard work for survival. In such an environment, incapacity and dependency were undesirable, as was reflected in the laws of the Thirteen Colonies. Those laws "excluded settlers who could not demonstrate an ability to support themselves independently. . . . Immigration policy forbade people with physical, mental, or emotional disabilities to enter the country."[1]

Growing up in early America was often difficult for children and youth with disabilities, and their families. It was the family's responsibility to care for any members who were born with disabilities or who became disabled through illness, injury, or other causes.[2] "Fear, shame, and lack of understanding led some families to hide or disown their handicapped members or allow them to die."[3] For those families who were unable or unwilling to support family members who had disabilities, public assistance brought some limited relief. People with disabilities could receive placement in privately run boarding homes that were supported by Federal financial assistance. Many of these homes, however, were notorious for accepting the Federal funding while neglecting or abusing the boarding residents.[4] There were some early institutions that offered care for individuals with specific disabilities. For example, in 1773, the Eastern State Hospital at Williamsburg, Virginia, was founded especially to treat mental illness. In 1817, the first American Asylum for the Deaf was established in Hartford, Connecticut, and in 1832, the Massachusetts Asylum for the Blind (later renamed the Perkins Institute) first opened.[5] Many were merely custodial or were unsanitary and overcrowded.[6]

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[1] U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (September 1983), p. 18 (hereafter cited as U.S. Commission on Civil Rights, *Accommodating the Spectrum*) (citing Frank G. Bowe, statement, *Civil Rights Issues of Handicapped Americans: Public Policy Implications*, a consultation sponsored by the U.S. Commission on Civil Rights, Washington, DC, May 13–14, 1980 (hereafter cited as *Civil Rights Issues*), p. 9).

[2] Ibid., p. 18 (citing President's Committee on Employment of the Handicapped, "Disabled Americans: A History," *Performance*, vol. 27, nos. 5, 6, 7 (November-December 1976, January 1977), p. 3).

[3] Ibid., p. 18 (citing Frank G. Bowe, statement, *Civil Rights Issues*, p. 3).

[4] This public assistance program continued until the latter half of the 19th century, when public concern over abuses of the system and poor treatment of the boarding residents led to reform. Ibid., p. 18 (citing Lloyd Burton, "Federal Government Assistance for Disabled Persons: Law and Policy in Uncertain Transition," in *Law Reform in Disability Rights*, vol. 2 (Berkeley: Disability Rights Education and Defense Fund, 1981), p. B–5).

[5] Ibid., p. 19 (citing President's Committee on Employment of the Handicapped, "Disabled Americans: A History," *Performance*, vol. 27, nos. 5, 6, 7 (November-December 1976, January 1977), pp. 20–28).

In early American history, the educational opportunities for children and youth who had mental retardation, learning disabilities,[7] behavior disorders, and emotional disturbance reflected society at the time.[8] There was little tolerance for or understanding of children and youth with these disabilities. For example, there were few distinctions between mental retardation and emotional disorders. Emotional disorders were viewed as a form of mental illness, and "in early efforts to provide services to the mentally ill little differentiation was made between the mentally retarded and the mentally ill."[9] Similarly, the history of educating students with learning disabilities in America reflects an initial misunderstanding about the learning difficulties of students. Often when students had difficulties in learning to read, write, or speak or when they performed poorly on tests and assignments, they generally were classified as "slow-learners" or mentally retarded. It was not until research identified a relationship of brain injuries to reading problems, language difficulties, and behavior disorders that schools began to view students with learning disabilities in a different light.[10]

Early Efforts to Educate Children and Youths with Disabilities

During the colonial period through the early 19th century, options for educational instruction were limited. They generally followed one of two paths. Either children and youths with disabilities obtained some educational instruction through institutions, residential facilities, or local community schools, or they relied on their families to provide education. For those who did obtain instruction outside the home, the educational setting usually varied depending on the severity of the disability. Children and youths with moderate to severe mental retardation and those with overaggressive or disruptive behavior resided in institutions or residential facilities that seldom addressed their educational needs. Few children and youths with these disabilities attended public schools even after enactment of compulsory education laws from 1852 through the first two decades of the 20th century.[11] Children and youths with mild disabilities were more successful in gaining access to community schools because their disabilities generally were not as apparent. Through the late 18th and mid-19th centuries, however, they usually faced generic teaching strategies that consisted of rote memorization and recitation.[12] Because of a lack of understanding of their disabilities and their educational needs, children and youth with mild mental retardation, learning disabilities, behavior disorders, and emotional disturbance who attended public schools often lagged in performance or were viewed as disciplinary problems. They often were

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[6] Ibid., p. 19 (citing Frank G. Bowe, statement, *Civil Rights Issues*, p. 9); and President's Committee on Employment of the Handicapped, "Disabled Americans: A History," *Performance*, vol. 27, nos. 5, 6, 7 (November-December 1976, January 1977), p. 20).

[7] The term "learning disabilities" did not appear until 1963. Prior to that time, there was limited recognition in the medical and education communities of children having visual perception problems, spoken language disorders, and disruptive behavior symptoms related to brain injuries. Bill R. Gearheart, *Special Education for the '80s* (St. Louis: The C.V. Mosby Co., 1980), pp. 176–78; and Donald D. Hammill, "A Brief Look at the Learning Disabilities Movement in the United States," *Journal of Learning Disabilities*, vol. 26, no. 5 (May 1993), pp. 295–96. *See* discussion, "Learning Disabilities," p. 18 below.

[8] *See* discussion, "Defining Disabilities," below for definitions of each of these disabilities, pp. 21–31.

[9] Gearheart, *Special Education for the '80s*, p. 288.

[10] Ibid., pp. 176–81.

[11] For several years after the establishment of these laws, there were few efforts to enforce mandatory school attendance. As a result, many children and youth with disabilities who attended schools often dropped out at early ages. *See* Seymour B. Sarason and John Doris, *Educational Handicap, Public Policy, and Social History: A Broadened Perspective on Mental Retardation* (New York: The Free Press, 1979), pp. 262–63.

[12] Ibid., p. 238.

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regarded as "backward," "refractory," "feebleminded," and "mentally or morally defective."[13]

For those who relied on their families to provide an education, the extent of educational instruction was largely dependent on wealth. Those families who could afford to do so hired private tutors to instruct their children. Those families who could not relied on assistance provided by charitable organizations or individuals or by churches and other religious groups. Some of these families attempted to provide instruction themselves, but in many cases, children and youth with disabilities remained uneducated and misunderstood.

The first real efforts to assist children with mental retardation and emotional disorders in the United States occurred in the 1840s. In 1846, the first State educational facility for the "socially maladjusted and incorrigible" was established in Westborough, Massachusetts. It operated with an intent to accept destructive and aggressive children, teach them by providing proper parental role models and guidance, and assist them in becoming "decent members of society."[14] This institution and others, however, failed to achieve success in part because of large enrollments and a lack of proper parental models. Two years later, in 1848, the first private school in America for educating severely mentally retarded children was created.[15]

Internationally, research was identifying natural causes for mental retardation, emotional disorders, and learning disabilities. Accompanying this research were new strategies to instruct individuals with these disabilities. In 1850, Edouard Seguin, a prominent French physician who worked with persons with mental retardation, emigrated to the United States. He initiated and was largely responsible for consolidating efforts in this country to assist persons with mental retardation. In 1850, Seguin helped to establish several residential facilities for persons with mental retardation in New York, Massachusetts, Pennsylvania, Ohio, and Connecticut.[16] Many of the facilities were privately operated and expensive[17] and, therefore, largely inaccessible to most children with mental retardation and emotional disabilities.

The Development of Special Education Classes

The development of special education programs for students with disabilities in America's public schools did not begin until the 19th century. Although society still viewed the institution as the optimal place to offer care and instruction addressing the needs of specific disabilities, a sense was developing that the State had a duty to educate its children. By the mid-19th century, "universal education of the young had become generally accepted as the responsibility of the whole community."[16] In keeping with this view, States began enacting compulsory education laws that required school attendance by children and youths, including those with disabilities.[19] In addition, public schools began undergoing organizational changes. In larger American cities, the ungraded, single-classroom setting was replaced with a division by grades. The grade divisions were based on a classification of pupils by levels of achievement "in order to make efficient use of the techniques of simultaneous teaching."[20]

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[13] Ibid., pp. 263, 278–79.

[14] Gearheart, *Special Education for the '80s*, p. 288 (citing E. Hoffman, "Treatment of deviance by the educational system" in W.C. Rhodes and S. Head, eds., *A Study of Child Variance*, vol. 3 (Ann Arbor: University of Michigan Press, 1974)).

[15] U.S. Commission on Civil Rights, *Accommodating the Spectrum*, p. 19, note 15 (citing President's Committee on Employment of the Handicapped, "Disabled Americans: A History," *Performance*, vol. 27, nos. 5, 6, 7 (November-December 1976, January 1977), pp. 20–28); and Gearheart, *Special Education for the '80s*, p. 251.

[16] Gearheart, *Special Education for the '80s*, pp. 249–51. In his home country of France, Seguin developed a teaching approach called the "physiologic method," which was successful in assisting persons with mental retardation. By 1844, his work received praise from a commission of scholars from the Paris Academy of Science, and in 1846, Seguin published his book, *The Moral Treatment, Hygiene, and Education of Idiots and Other Backward Children*, which received international acclaim. Seguin also served as the first president of the Association of Medical Officers of American Institutions for Idiotic and Feebleminded Persons, later to become the American Association on Mental Deficiency.

[17] Anne M. Hocutt, Edwin W. Martin, and James D. McKinney, "Historical and Legal Context of Mainstreaming," in John Wills Lloyd, Nirbhay N. Singh, and Alan C. Repp, eds., *The Regular Education Initiative: Alternative Perspectives on Concepts, Issues, and Models* (Sycamore, IL: Sycamore Publishing Co., 1991), p. 18.

The appearance of compulsory education laws and efforts to develop more efficient instructional techniques provided the main impetus in developing special education programs within public schools for students with disabilities.[21] Children and youth with disabilities who met the required ages began appearing in greater numbers in public classrooms. As schools adopted new educational strategies to accommodate larger class sizes, the needs of students with mental retardation, learning disabilities, behavior disorders, or emotional disorders created obstacles to an efficient educational system. Many educators felt that the attention and energy required of teachers to instruct students with these disabilities took away from the instruction necessary for other students in a class. Therefore, they thought it was more productive to create special classes for students with disabilities, separate from the regular class structure.[22]

The special education program for students with disabilities was an outgrowth of the special class or "clearing house" that held truants, students who posed discipline problems, and students who otherwise could not be served in the regular class or within the graded structure.[23] The special classes, also known as "ungraded classes" and "opportunity rooms," "were often repositories for many different kinds of children who could not adapt to the regular graded classes."[24] They appeared in the public schools of some larger American cities as early as the 1870s. For example, a public school special class for the deaf was opened in Boston, Massachusetts, in 1869, a truancy class was established in New York in 1874, and a disciplinary class was offered in Cleveland, Ohio, in the late 1870s.[25] In addition, in New Haven, Connecticut, ungraded schools were established within the public school system in 1871 to assist students with disabili-

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[18] Sarason and Doris, *Educational Handicap, Public Policy, and Social History*, p. 250.

[19] Ibid., p. 225.

[20] Ibid., p. 250.

[21] Ibid., p. 261.

[22] In a 1908 article in *Psychological Clinic*, a former superintendent of Baltimore Public Schools outlined rationales for creating special classes for students with disabilities. First, "[i]t is manifestly more expensive to maintain small classes for backward and refractory children, who will profit little by the instruction they receive, than to maintain large classes for children of normal powers. . . [Second] the presence in a class of one or two mentally or morally defective children so absorbs the energies of the teacher and makes so imperative a claim upon her attention that she cannot under these circumstances properly instruct the number commonly enrolled in a class." These views appeared in much of the literature on education at the time. Ibid., p. 263 (citing J.H. Van Sickle, "Provision for Exceptional Children in the Public Schools," *Psychological Clinic*, vol. 2 (1908–09), pp. 102–03).

[23] This is reflected in the generic definition for "special classes" offered in 1913: "any form of class for a group of children who are in some way exceptional or who cannot, therefore, be instructed to advantage in the regular classes of the school system, either because they fail to receive the instruction suited to the special needs or because they receive such instruction at the expense of the remainder of the class." Ibid., p. 275 (citing G.M. Whipple, "Special Classes," in P. Monroe, ed., *A Cyclopedia of Education*, vol. 5 (New York: Macmillan, 1913), p. 384). Johnstone, an educator and author in the early 1900s, referred to the special class as a "clearing house" . . . "[t]o it will not only be sent the slightly blind and partially deaf, but also the incorrigibles, the mental deficients, and cripples. In the beginning it must be expected that more than one of these types will be found in the same classroom, and indeed all of them may drift in." Ibid., p. 266 (citing E.R. Johnstone, "The Functions of the Special Class," *National Education Association Journal of Proceedings and Address of the 46th Annual Meeting*, 1908, p. 1115).

[24] Sarason and Doris, *Educational Handicap, Public Policy, and Social History*, p. 275. *See also* Alan Gartner and Dorothy Kerzner Lipsky, *Beyond Separate Education: Quality Education for All* (Baltimore: Paul H. Brookes Co., 1989), p. xxiv.

ties.[26] Most often, schools initially designed the special classes for truancy or discipline cases. It was in these "disciplinary classes" that students with emotional and behavioral disabilities remained through the remainder of the 19th century and most of the 20th century. Teachers known to be strong disciplinarians were selected to instruct these classes.[27]

Schools, however, later would assign other types of students to special classes, including the "mentally subnormal."[28] Attempts to sort and reassign students in the catchall special classes eventually led to the formation of classes for those with mental retardation and learning disabilities. For example, in Providence, Rhode Island, what began as special disciplinary classes in the public schools led to one of the first successful programs of special education classes for students with mental retardation in 1896.[29] The success in Providence encouraged the establishment of other special education programs for students with mental retardation in Springfield, Massachusetts, in 1897; in Chicago, Illinois, in 1898; and in Boston, Massachusetts, in 1899.[30] In special classes, students with mental retardation or learning, behavioral, and emotional disabilities were able to acquire low level work skills and make minimal adaptations to community life.[31]

Although there were only isolated instances of special classes for children with disabilities prior to 1900, during the first decade of the 20th century, special education classes proliferated.[32] The creation of State financial incentives eventually encouraged the offering of more programs for those with mild mental retardation, learning disabilities, and emotional disorders.[33] For instance, by the end of the 19th century, the State of Minnesota offered aid to each child attending public school, regardless of disability status, and it required special certification for teachers of "exceptional children."[34]

Efforts to Exclude Children and Youths with Disabilities

In the late 19th century, the ideas of Social Darwinism and its notion of "survival of the fittest" spawned a "eugenics" movement in this country. The movement sought to ensure a nation

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[25] Sarason and Doris, *Educational Handicap, Public Policy, and Social History*, p. 275.

[26] Gearheart, *Special Education for the '80s*, p. 288 (citing E. Hoffman, "Treatment of Deviance by the Educational System" in W.C. Rhodes and S. Head, eds., *A Study of Child Variance. Vol. 3* (Ann Arbor: University of Michigan Press, 1974).

[27] Gearheart, *Special Education for the '80s*, p. 290.

[28] Sarason and Doris, *Educational Handicap, Public Policy, and Social History*, p. 276.

[29] Hocutt, Martin, and McKinney, "Historical and Legal Context of Mainstreaming," p. 18.

[30] Gearheart, *Special Education for the '80s*, p. 251. Sarason notes that Springfield, Massachusetts, is generally given credit for establishing the second class for students with mental retardation in an American school. Unlike Gearheart, he dates the establishment of the program in 1898. *See* Sarason and Doris, *Educational Handicap, Public Policy, and Social History*, p. 277.

[31] Gearheart, *Special Education for the '80s*, p. 251.

[32] In 1911, the U.S. Bureau of Education published a Bulletin of the Provision of Exceptional Children in Public Schools. The bulletin reported the results of 898 replies to a survey questionnaire sent to 1,285 city school superintendents. The responses were treated as referring to provisions made for children categorized as morally, mentally, physically, or environmentally exceptional. One hundred fifty-two cities had classes for "the delinquent, incorrigible, and refractory children." Ninety-one cities provided classes to those with physical disabilities, "such as the blind, the deaf, the dumb, the crippled, the speech-handicapped, and the weak or sickly child." Three hundred forty-six cities provided for "the environmentally exceptional, primarily non-English speaking pupils or late entering students." Ninety-nine school systems had classes for "the mentally defective." Two hundred twenty had classes for "the backward child, and 54 had classes for the exceptionally gifted." Sarason and Doris, *Educational Handicap, Public Policy, and Social History*, p. 279.

[33] Gearheart, *Special Education for the '80s*, pp. 251–52.

[34] Ibid., pp. 18–19.

of mentally and physically sound citizens and blamed mental and physical disabilities for nearly all social problems in the United States. People with disabilities "frequently were referred to as 'mere animals,' 'sub-human creatures,' and 'waste products' who were draining the economy and producing only 'pauperism, degeneracy, and crime.'"[35] Some professionals advocated the institutionalization of people who had even minor disabilities, and institutionalization soon became an automatic response for dealing with people with disabilities.[36]

The movement not only strengthened support for institutionalizing children and youths with disabilities, it also prompted judicial and legislative activities that emphasized a dichotomy of citizenship and denied access to public education. State courts throughout the United States sanctioned exclusion of children with disabilities from public education despite the students' need for, and demonstrated ability to benefit from, schooling.[37] Many State laws did not require public elementary and secondary school systems to offer programs for students with disabilities.[38] The special classes that had developed were offered at the discretion of the public schools. States throughout the country allowed the exclusion of a child when school authorities concluded that the child could not benefit from public education or that the child's presence would disrupt the education of other students.[39] For many parents of children with disabilities, the costs of private education made the possibility of any education for their children an inviable option.[40]

Growth of Special Education

By the 1920s the eugenics movement in the United States had largely disappeared, and States began enacting legislation to promote the education of students with disabilities.[41] In 1911, New Jersey became the first State to enact legislation requiring the provision of special classes for mentally subnormal children. In 1917, New York State followed. A rapid growth in special education programs followed, prompted by not only "the stimulus of state enactments" but also the increasing use of the intelligence test.[42] Greater attention also was given to psychological and sociological needs of students who were mentally subnormal, mentally ill, or delinquent. School districts began relying on psychologists to administer and interpret psychological and intelligence tests that were used to place students and provide students with vocational advice.

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[35] U.S. Commission on Civil Rights, *Accommodating the Spectrum*, pp. 19–20 (citing Wolf Wolfensberger, "The Origin and Nature of Our Institutional Models," in Robert B. Kugel and Wolf Wolfensberger, eds., *Changing Patterns in Residential Services for the Mentally Retarded* (Washington, DC: President's Committee on Mental Retardation, 1969), pp. 102, 106–07).

[36] Ibid., p. 20.

[37] *See* Mark C. Weber, *Special Education Law and Litigation Treatise* p. 1:1 (1992) (hereafter cited as Weber, *Special Education Law and Litigation Treatise*) (discussing Watson v. City of Cambridge, 157 Mass. 561, 32 N.E. 864 (1893) (upheld the expulsion from public schools of a child who was "weak in mind"); Beattie v. Board of Educ., 169 Wis. 231, 172 N.W. 153 (1919) (approved the exclusion of a child who had the academic and physical ability to benefit from school, but who drooled uncontrollably, had a speech impediment, and exhibited facial contortions); and Department of Pub. Welfare v. Haas, 15 Ill.2d 204, 154 N.E.2d 265 (1958) (ruling that existing legislation requiring compulsory education for children and establishing a program for children with disabilities did not require that a free public education be provided to a child with mental impairments.)).

[38] *See* Rebecca Weber Goldman, "A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act," *Dayton Law Review* (vol. 20), pp. 243, 247 (1994); and Caryl Andrea Oberman, "The Right to Education for the Handicapped: Three Decades of Deliberate Speed," *Amicus*, May/Aug. 1980, p. 44.

[39] Weber, *Special Education Law and Litigation Treatise*, p. 1:2. Oftentimes, a school could label a child as "uneducable" and then either send the child home or recommend placement in a custodial facility. Goldman, "A Free Appropriate Education," p. 247, n. 38.

[40] The Senate Committee Report on S.6, the bill later enacted as the Education for All Handicapped Children Act in 1975, notes: "Whereas the actions taken at the State and national levels over the past few years have brought substantial progress, the parents of a handicapped child or a handicapped child himself must still too often be told that adequate funds do not exist to assure that child the availability of a free appropriate public education." S. Rep. No. 168, at 8 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1432.

[41] Sarason and Doris, *Educational Handicap, Public Policy, and Social History*, p. 309.

By the 1920s and 1930s, there were attempts to establish classification systems for, describe characteristics of, and define mental retardation and emotional disturbance.[43] In addition, there were efforts to combine various services to assist those with behavior disorders and emotionally disturbed youth. For example, the board of education for New York City established the Bureau of Child Guidance which sought to meet the emotional and psychological needs of school-age children and youth. In practice, school psychologists, counselors, social workers, and consulting psychiatrists pooled their knowledge to devise a plan to assist students. In the late 1930s, the Children's Bureau in New Jersey brought police, psychiatrists, and psychologists together to offer rehabilitative services to students who committed crimes, truants, or other students who were unable to function successfully in school. In 1946, New York City established special schools for the emotionally disturbed, known as "600 Schools." These schools, however, were often custodial institutions with little rehabilitative emphasis.[44]

Also in the 1930s, Alfred Strauss, a research psychiatrist, and Laura Lehtinen, an educator, teamed their efforts to research and write about the education of children who had brain injuries.[45] Strauss observed that many students who had reading, language, and other difficulties, now known as learning disabilities, also exhibited hyperactivity. Strauss, Lehtinen, and William Cruickshank began developing approaches to reduce the hyperactivity in students who had learning disabilities. Their approaches sought ways to modify or control the student's learning environment, thereby limiting the causes of the hyperactivity. Strauss and others also initiated special schools, known as Cove Schools, for brain-injured students who were not admitted to public schools.[46]

Federal Legislation and Activism

By the 1950s and 1960s, a new interest in, and concern for, persons with disabilities began to develop. The Federal Government began considering ways to assist States in providing children and youths with disabilities access to education.[47] One year after enactment of the Elementary and Secondary Education Act of 1965,[48] the most sweeping piece of Federal legislation to support public education at the time, Congress amended Title I of the act to provide grants for State agencies serving children with disabilities in State-supported institutions.[49] That same year, an ad hoc subcommittee of the House of

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[42] Ibid., p. 310. The original intelligence test was developed by the French psychologist Alfred Binet at the turn of this century to help identify schoolchildren who were unlikely to benefit from regular instruction. Patricia Morison, Sheldon H. White, and Michael J. Feuer, eds., *The Use of IQ Tests in Special Education Decision Making and Planning* (Washington, DC: National Academy of Sciences, 1996), p. 1.

[43] Gearheart, *Special Education for the '80s*, p. 289.

[44] Ibid., pp. 289–90.

[45] The text, first published in 1947, was entitled *Psychopathology and Education of the Brain Injured Child* and was widely used for some 20 years. Gearheart, *Special Education for the '80s*, p. 187.

[46] Gearheart, *Special Education for the '80s*, pp. 187–88.

[47] *See* H. Rep. No. 805 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4093, 4139.

[48] Pub. L. No. 89–10, 79 Stat. 27.

[49] Pub. L. No. 89–313, 79 Stat. 1158. *See also* H. Rep. No. 805, 3d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4093, 4114.

Representatives' Education and Labor Committee held hearings which detailed the educational needs of children with disabilities:

> Only about 1/3 of approximately 5.5 million children were being provided with an appropriate specialized education. The remaining two-thirds were excluded from schools, or sitting idly in regular classrooms awaiting the day they would be old enough to drop out. . . . Federal programs were minimal, and further . . . they were fractionated, non-coordinated and frequently housed in general administrative units where they were given a low priority.[50]

On the basis of these hearings, Congress added a new title to the Elementary and Secondary Education Act, Title VI. Title VI began a grants program to States for children and youth with disabilities. Congress also established a National Advisory Committee on Handicapped Children. It created within the Federal Government's Office of Education a Bureau of Education for the Handicapped to serve as "a single strong administrative body" to administer and oversee Federal programs to assist in the education of children and youth with disabilities.[51] Four years later, in 1970, Congress repealed Title VI. It created a separate act, replacing and expanding Title VI, devoted to supporting the educational needs of children and youths with disabilities. That act was known as the Education of the Handicapped Act.[52]

As the Federal Government was taking a greater interest in advancing the education of children and youths with disabilities from the 1950s to 1970s, research increased into the nature and causes of specific disabilities. This led to a greater understanding of the differences in and levels of mental retardation, learning disabilities, behavior disorders, and emotional disabilities. In addition, parents and educators began forming a number of advocacy groups and organizations that focused specifically on education issues relating to mental retardation, learning disabilities, behavioral disabilities, and emotional disturbance.[53]

Mental Retardation and Emotional Disturbance

In 1950, the National Association for Retarded Citizens, a major organization supporting the interests of persons with mental retardation, was founded. In October 1961, President John F. Kennedy appointed a National Panel on Mental Retardation to create a national plan to combat mental retardation.[54] Passage of the Mental Retardation Facilities and Community Mental Health Centers Construction Act in 1963[55] led to significant improvements in educating students with emotional disturbance. The act provided funding for professional development, including training for the instruction of students with emotional disturbance. With increases in the number of professionals trained to teach students with emotional disturbance, schools began offering classes for students with emotional disturbance.[56] In 1966, President Lyndon B. Johnson appointed the President's Committee on Mental Retardation to provide continued advice and recommendations on the needs of persons with mental retardation.

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[50] H. Rep. No. 805, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4093, 4137.

[51] Pub. L. No. 89–750, § 161, 80 Stat. 1204. *See also* H. Rep. No. 805, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4093, 4137; and Sen. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1429.

[52] Pub. L. No. 91–230, §§ 601–662, 84 Stat. 175. *See also* H. Rep. No. 805, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4093, 4137; and Sen. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1429.

[53] *See* Gearheart, *Special Education for the '80s*, pp. 178–79, 248, 252; Hammill, "A Brief Look," p. 297.

[54] Gearheart, *Special Education for the '80s*, p. 252.

[55] Pub. L. No. 88–164, 77 Stat. 100.

[56] Gearheart, *Special Education for the '80s*, pp. 290–91.

Greater awareness of mental retardation also arose with the initiation of the Special Olympics in 1968 by the Joseph P. Kennedy, Jr. Foundation.[57] In 1974, growing commitment to the education of students with severe disabilities led to the organization of the American Association for the Education of the Severely and Profoundly Handicapped, later renamed The Association for the Severely Handicapped. This organization played a major role in the development of education programs for students with severe disabilities, including those with emotional disturbance.[58]

Learning Disabilities

The oldest of the learning disabilities organizations, the Orton Dyslexia Society, was founded in 1949, to focus on the medical and educational aspects of reading and writing problems.[59] In 1963, an informal parent group, the Fund for Perceptually Handicapped Children, sponsored a conference to address the education of students with reading and language problems, where attendees officially voted to become the Association for Children with Learning Disabilities. This group is known today as the Learning Disabilities Association of America.[60] Five years later, in 1968, the Council for Learning Disabilities formed as an organization primarily of professionals working in colleges and schools in special education and related fields. In 1969, an amendment was added to The Elementary and Secondary Education Act of 1965 to mandate the Federal Government to facilitate the development of the learning disabilities field as a separate entity within special education.[61] Beginning in 1971, the Bureau of Education for the Handicapped authorized Child Service Demonstration Projects throughout the country to stimulate instructional services to children with learning disabilities. By 1986, 34 States offered teaching certification endorsement in "learning disabilities." In 1975, the National Joint Committee on Learning Disabilities organized to establish greater cooperation among organizations primarily concerned with individuals with learning disabilities. Organizations represented on the committee have included the American Speech-Language-Hearing Association, Association on Higher Education and Disability, Council for Learning Disabilities, Division for Children with Communication Disorders, Division for Learning Disabilities, International Reading Association, Learning Disabilities Association of America, National Association of School Psychologists, and the Orton Dyslexia Society.[62]

From Activism to Civil Rights Laws

At the same time that disability advocacy groups and professional organizations were forming, a great deal of litigation arose over the rights of children with disabilities and problems of their exclusion and segregation in public schools.[63] Many of the lawsuits concerned problems faced by children classified as having mental retardation, learning disabilities, behavioral disabilities, or emotional disturbance. For example, *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*,[64] (*P.A.R.C.*) involved a class action under the equal protection clause of the U.S. Constitution on behalf of all mentally retarded persons between the ages of 6 and 21. The Commonwealth of Pennsylvania had excluded these students from education and training in public schools. The court in *P.A.R.C.* recognized the State's "obligation to place each mentally retarded child in a free, public program of education and training *appropriate to the child's capacity, within the context of a presumption that . . . placement in a regular public school class is preferable to placement in a special school class and placement in a special public school class is preferable to placement in any other type of program of education and training.*"[65] *P.A.R.C.* foreshadowed an emphasis on concepts, such as individualized education and placement, that would continue in subsequent Federal legislation and in contemporary debates.

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[57] Ibid., p. 252.

[58] Donald S. Marozas and Deborah C. May, *Issues and Practices in Special Education* (New York: Longman, Inc., 1988), p. 12 (citing R. Schmid, J. Moneypenny, and R. Johnston, *Contemporary Issues in Special Education* (New York: McGraw-Hill Book Co., 1977)).

[59] Hammill, "A Brief Look," p. 297.

[60] Gearheart, *Special Education for the '80s*, pp. 178–79; and Hammill, "A Brief Look," p. 297.

[61] This amendment was known as The Children with Specific Learning Disabilities Act of 1969, widely known as the Yarborough Bill. Hammill, "A Brief Look," p. 298.

[62] Ibid., p. 297.

[63] *See* S. Rep. No. 168, 94th Cong., 1st Sess. 7 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1431 (noting "[i]n recent years decisions in more than 36 court cases in the States have recognized the rights of handicapped children to an appropriate education.").

In *Mills v. Board of Education of the District of Columbia*,[66] seven students with learning disabilities and/or emotional disturbance sued the District of Columbia public school system for exclusion from schools or denial of publicly supported education altogether. The district court determined that denial of publicly supported education for students with disabilities violated the U.S. Constitution's Equal Protection Clause and that suspension or expulsion of the students without any prior hearing or periodic review thereafter deprived them of due process of law.[67]

As these cases arose, Congress considered the lingering problems confronted by children with disabilities. In 1974, data on the school-age population indicated that fewer than 40 percent of those students requiring special education received an adequate education; conversely, 60 percent were not receiving the special education they required; and there were as many as 1 million school-age children with disabilities for whom no educational opportunity was available.[68] These figures prompted members of the House Committee on Education and Labor to note:

> . . . from both a humanitarian and an economic standpoint, it is obvious that an adequate education should be made available for *all* handicapped children. . . . The inability of the states to provide for more than 40 percent of these handicapped children and the higher cost of education for the severely handicapped places a critical responsibility on the Federal Government to share costs with states and local communities and be the catalyst agent which stimulates activity for the handicapped.[69]

These concerns led to an extension of the Education of the Handicapped Act of 1970 and a new Federal policy that all "handicapped children are entitled to an appropriate free public education."[70]

Congressional hearings on the educational needs of students with disabilities continued after enactment of the 1974 amendments of the Education of the Handicapped Act.[71] In 1975, parents, teachers, disability advocates, and students testified before members of Congress on the persisting exclusion or segregation of disabled students, particularly of the most severely disabled and the seriously emotionally disturbed.[72] In addition, they spoke of the negative effects of classification or labeling of students with disabilities on student

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[64] 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972).

[65] 334 F. Supp. at 1260 (emphasis added).

[66] 348 F. Supp. 866 (D.D.C. 1972).

[67] *Id.* at 875.

[68] H. Rep. No. 805, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4138.

[69] H. Rep. No. 805, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4138.

[70] H. Rep. No. 805, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4093, 4146.

[71] Pub. L. No. 93–380, 88 Stat. 484 (as amended) (codified as amended at 20 U.S.C. §§ 1400–1485 (1994)).

[72] Sen. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425.

self-esteem, student achievement, and teacher expectations. These individuals criticized the treatment of students with disabilities as members of particular disability categories instead of as unique individuals.[73]

The judicial decrees arising from *P.A.R.C.* and *Mills* and the testimony presented to Congress led, in part, to dramatic changes in the education of children with disabilities. Two pieces of legislation were enacted into law that profoundly affected the education of children with disabilities: section 504 of the Rehabilitation Act of 1973,[74] and the Education for All Handicapped Children Act (EHA),[75] later renamed the Individuals with Disabilities Education Act (IDEA) in 1990.[76] Section 504 conferred on children and youths with disabilities the right to nondiscrimination in public elementary and secondary schools receiving Federal financial assistance.[77] The IDEA created substantive and procedural rights for children and youths with disabilities and their parents.[78] These statutes increased access to public elementary and secondary schools for children with disabilities. In addition, the statutes and their implementing regulations focused great attention on practices viewed as fundamental to the education of children with disabilities. For example, they called for the development of individualized education programs for each disabled student,[79] and they created a preference for placement of students with disabilities in classes with nondisabled students.[80]

More than a decade later, there were still concerns among those with disabilities and disability advocates that not enough was being done to ensure equal access for individuals with disabilities. On July 26, 1990, the Americans with Disabilities Act of 1990 (ADA)[81] was signed into law. Although neither the ADA nor its regulations explicitly refer to public elementary and secondary educational programs, Title II of the ADA covers any "public entity."[82] The act defines "public entity" as "any department, agency, special purpose district, or other instrumentality of a State or local government."[83] Title II of the ADA, therefore, covers the discriminatory conduct in education programs specifically prohibited under section 504.[84] For children and youths with physical and mental disabilities, this has provided them with an additional protection against discrimination in public elementary and secondary schools.

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[73] *Id.*

[74] Pub. L. No. 93–112 § 504, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (1994)).

[75] Pub. L. No. 94–142, 89 Stat. 773 (as amended), *renamed* the Individuals with Disabilities Education Act, Pub. L. No. 101–476, 104 Stat. 1143 (codified as amended at 20 U.S.C. §§ 1400–1485 (1994)).

[76] Pub. L. No. 101–476, 104 Stat. 1143 (codified as amended at 20 U.S.C. §§ 1400–1485 (1994), *amended by* the IDEA Amendments of 1997, Pub. L. No. 105–17).

[77] 29 U.S.C. § 794(a) (1994). Section 504 of the Rehabilitation Act of 1973 provides, in part:
"No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." *Id.*

[78] *See* Pub. L. No. 105–17, § 611–619 (1997). The five basic rights are summarized as follows: (1) each child with a disability has a right to a free public education, regardless of the severity or type of disability; (2) each child with a disability must receive a public education that is appropriate to the child's unique needs; (3) each child with a disability must be educated in the least restrictive environment possible; (4) each child with a disability is entitled to an individualized education program; and (5) the parents or guardians of each child with a disability is guaranteed due process rights in the evaluation and placement of the child. Goldman, "A Free Appropriate Education," p. 253, n. 38.

[79] Pub. L. No. 105–17, § 612(a)(4) (1997); 34 C.F.R. § 104.33(b) (1996).

[80] *Id.*, § 612(a)(5)(A), (B) (1997); and 34 C.F.R. pt. 104, subpt. D (1996).

[81] Pub. L. No. 101–336, 104 Stat. 327.

[82] 42 U.S.C. § 12,132 (1994). This provision states in pertinent part that:
"[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

Defining Disabilities

Mental Retardation

The most widely recognized definition[85] of "mental retardation" is from the *Manual on Terminology and Classification in Mental Retardation*, relied upon by the American Association on Mental Retardation (AAMR).[86] Prior to 1992, the manual defined mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period."[87]

The 1977 AAMR manual offers an explanation of some of the key terms. For example, the manual defines "developmental period" as the period between birth and age 18 and "adaptive behavior" as a measure of the degree to which an individual "meets the standards of personal independence and social responsibility expected of his age and cultural group." It refers to "general intellectual functioning" as the results of individual intelligence tests, and it defines "significantly subaverage" intellectual function as an IQ of more than 2 standard deviations below the mean for the test.[88] In 1983, the AAMR defined "significantly subaverage intelligence" as an IQ below 70, but it also permitted the upper limit "cutoff" score to be 75 or beyond, depending on a variety of tests and individual characteristics of the student, especially in the school setting.[89] Because most States have either relied on the pre-1992 AAMR definition or have included the criterion of measured intelli-

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[83] 42 U.S.C. § 12,131(1)(A), (B) (1994)

[84] OCR has expressly indicated in its policy guidance that Title II of the ADA covers the discriminatory conduct in education programs specifically prohibited under section 504. *See* Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, Nov. 19, 1992, 19 IDELR 859, 860.

[85] Among disability advocates, educators, and the medical community, there is some disagreement on the definitions of mental retardation, learning disabilities, behavioral disabilities, and emotional disturbance. This section briefly discusses the origins of these disability terms; it presents the current Federal definitions, as they exist; and it presents some of the differing views and concerns on defining these disabilities. For the purposes of consistency in the remainder of this chapter and other chapters of this volume, references to learning disabilities, mental retardation, and serious emotional disturbance rely on the definitions for "specific learning disability," "mental retardation," and "serious emotional disturbance" offered in the Federal regulations implementing the IDEA. *See* 34 C.F.R. § 300.7(a)(5), (9) and (10) (1996).

[86] Gearheart, *Special Education for the '80s*, p. 253 (citing H. Grossman, ed., American Association on Mental Deficiency, *Manual on Terminology and Classification in Mental Retardation* (Baltimore: Garamond/Pridemark Press, 1977)) (hereafter cited as Grossman, *Manual on Terminology and Classification in Mental Retardation*). Subsequent to 1980, the American Association on Mental Deficiency renamed itself the American Association on Mental Retardation. Charlotte Hawkins-Shepard, "Mental Retardation," ERIC Digest EDO–EC–93–11 (September 1994) (Reston, VA: Clearinghouse on Disabilities and Gifted Education, Council on Exceptional Children, 1994).

[87] This definition is sometimes referred to as the "1973 definition" because of the year in which it was first published. Herbert J. Grossman, ed., American Association on Mental Deficiency, *Manual on Terminology and Classification in Mental Retardation* (Baltimore: Garamond/Pridemark Press, 1977), p. 11 (hereafter cited as Grossman, 1977 *Manual on Terminology and Classification in Mental Retardation*).

[88] Grossman, 1977 *Manual on Terminology and Classification in Mental Retardation*, p. 122.

[89] *See* Frankenberger and Fronzaglio, "States' Definitions and Procedures," p. 317 (citing H.J. Grossman, ed., *Classification in Mental Retardation* (Washington, DC: American Association on Mental Deficiency, 1983). *See also* Hawkins-Shepard, "Mental Retardation" (defining "significantly subaverage" intellectual functioning to mean an IQ of 70 to 75 or below those scores on a standardized individual intelligence test).

gence in their own definitions,[90] intelligence tests have been a primary means of identifying students with mental retardation, although the upper limit IQ cutoff score has varied among some of the States.[91]

In 1992, the AAMR created a new definition of mental retardation:

> *Mental retardation* refers to substantial limitations in present function. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. Mental retardation manifests before age 18.[92]

The new definition replaces a description of mental retardation as a general state of deficiency with references to a pattern of limitations. This definition describes how people function in various contexts of everyday life.[93] The 1992 definition raises the threshold IQ level for making a diagnosis of mental retardation to 75. It also provides more substance to the concept of adaptive behavior used in previous definitions (although some have pointed out that accurate measures of adaptive behavior still do not exist). In addition, the 1992 definition requires that any assessment of whether a child has mental retardation consider the child's cultural and linguistic background.[94]

The AAMR used to classify mental retardation into four levels: mild, moderate, severe, and profound.[95] A major innovation in the 1992 definition is that individuals with mental retardation no longer are classified by severity levels. Instead, they are classified in terms of the levels of support they will need over their lives. The four levels of support are:

> (1) intermittent supports that may be episodic or short term and may be needed over a person's life span; (2) limited supports that require more consistency over longer periods of time; (3) extensive supports that involve regular involvement by service providers; and (4) pervasive supports that require constant intense involvement by service providers and may potentially require life-sustaining assistance.[96]

Mental retardation can be caused by any conditions that impair development of the brain before birth, during birth, or in the childhood years. The causes can be categorized generally as: (1) genetic conditions, such as Down Syndrome; (2) problems during pregnancy; (3) problems at birth; (4) problems after birth; and (5) poverty.[97] Some of the characteristics of students with mental retardation include delays in the development of language, speech, and motor skills significantly below that of same-age children who do not have mental retardation. Children with mental retardation also may generally be below the normal height and weight of same-age children, and they may have a higher incidence of vision and hearing impairment. In contrast to their nondisabled classmates, students with mental retardation often have problems with attention, perception, memory, problem-solving, and logical thought.

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[90] *See* Frankenberger and Fronzaglio, "States' Definitions and Procedures," p. 317 (States that had developed their own definition always included the criterion of measured intelligence in their definitions.).

[91] Ibid., p. 318.

[92] Ibid., p. 315.

[93] Hawkins-Shepard, "Mental Retardation."

[94] John Langone, "Mild Mental Retardation," ch. 6 in Phillip J. McLaughlin and Paul Wehman, *Mental Retardation and Developmental Disabilities*, 2nd ed. (Austin, TX: Proed, 1996), pp. 113–15.

[95] Grossman, 1977 *Manual on Terminology and Classification in Mental Retardation*, p. 36.

[96] Langone, "Mild Mental Retardation," pp. 114–15.

[97] The Arc, "Q&A: Introduction to Mental Retardation," September 1993. *See also* Gearheart, *Special Education for the '80s*, pp. 258–64.

They are slower in learning how to learn and find it harder to apply what they have learned to new situations or problems.[98]

The definition of mental retardation in the regulations implementing the IDEA Part B is: "'Mental retardation' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance."[99] This definition resembles the pre-1992 AAMR definition[100] and not the more recent 1992 definition. It also does not further define some key phrases, such as "general intellectual functioning," "significantly subaverage," "developmental period," or "adaptive behavior."[101]

Learning Disabilities

Although there was recognition for learning disabilities prior to 1963, it was not until that year that the term received formal acceptance and use. On April 6, 1963, Dr. Samuel Kirk, a highly respected and recognized special educator, presented a speech on the use of labeling before a parent group, the Fund for Perceptually Handicapped Children.[102] In this speech Dr. Kirk suggested the use of the term "learning disabilities" to describe children who have disorders in development in language, speech, reading, and associated communication skills needed for social interaction. He noted that he did *not* include within this group children who have sensory disabilities, such as blindness or deafness, or those with generalized mental retardation.[103] Dr. Kirk later headed the National Advisory Committee on Handicapped Children. The advisory committee's first annual report made major recommendations on educating children with disabilities. In addition, it recognized the need for a definition for learning disabilities and offered its own as the first national definition of the term.[104] More recently, learning disability has been defined as "an

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[98] Hawkins-Shepard, "Mental Retardation."

[99] 34 C.F.R. § 300.7(b)(5) (1996).

[100] *See* 34 C.F.R. § 300.7(b)(5) (1996) (Mental retardation is defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance."). According to Frankenberger and Fronzaglio, the AAMR definition formed the basis for the IDEA definition. *See* William Frankenberger and Kathryn Fronzaglio, "States' Definitions and Procedures for Identifying Children with Mental Retardation: Comparison Over Nine Years," *Mental Retardation*, vol. 22, no. 6 (December 1991), p. 315 (hereafter cited as Frankenberger and Fronzaglio, "States' Definitions and Procedures").

[101] The IDEA, Part B does not attempt to define all aspects of a particular disability because in keeping with the principle of local control over education, States are given the discretion to adopt their own definitions.

[102] Parents from that group later formed the Association for Children with Learning Disabilities (ACLD), which lobbied for provisions in the Education for All Handicapped Children Act, Pub. L. No. 94–142 (today known as the IDEA), for the learning disabled. Gearheart, *Special Education for the '80s*, p. 179. In 1989, ACLD changed its name to the Learning Disabilities Association of America (LDA). Hammill, "A Brief Look," p. 296.

[103] Gearheart, *Special Education for the '80s*, p. 179 (citing S. Kirk, *Behavioral Diagnosis and Remediation of Learning Disabilities* (statement delivered at the First Annual Meeting of the Conference on the Exploration into the Problems of the Perceptually Handicapped Child), First Annual Meeting, vol. 1 (Apr. 6, 1963).

[104] Gearheart, *Special Education for the '80s*, pp. 179–80. That definition was as follows: "[c]hildren with special learning disabilities exhibit a disorder in one or more of the basic psychological processes involved in understanding or in using spoken or written languages. These may be manifested in disorders of listening, thinking, talking, reading, writing, spelling, or arithmetic. They include conditions which have been referred to as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, developmental [a]phasia, etc. They do not include learning problems which are due primarily to visual, hearing, or motor handicaps, to mental retardation, emotional disturbance, or to environmental disadvantage." Ibid., pp. 179–80 (citing *First Annual Report of the National Advisory Committee on Handicapped Children*, Washington, DC, Office of Education, Department of Health, Education and Welfare, 1968). Note that the term "brain injury" is different from "Traumatic Brain Injury," which is a separate disability category under Part B of IDEA. 34 C.F.R. § 330.7(b)(12) (1996).

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unexplained inability to master learning-related tasks."[105] However, researchers have had difficulty arriving at a consensus definition of learning disability, with some focusing on language delay and others on visual-motor performance, while still others argue that there is little to distinguish children with learning disabilities from children with other disabilities, such as mental retardation or other developmental disabilities.[106]

Unlike students with mental retardation, students with learning disabilities appear to possess the same range of intelligence as students without learning disabilities, including average, below-average, or above-average intellect. Consequently, the level of intelligence is not necessarily related to the learning problems. Usually, the learning problems are a result of differences in the structure and function of the brain. For example, students with perceptual disabilities have difficulty in accurately processing, organizing, and discriminating among visual, auditory, or tactile information. They may say that "cap" and "cup" sound the same or that "b" and "d" look the same.[107] Students with dyslexia have problems in language processing. They have difficulties in translating language to thought, as in listening and reading, or in translating thought to language, as in writing or speaking. The problems in language processing usually are characterized by a lack of awareness of sounds in words; difficulty in identifying single words; difficulty spelling; difficulty in identifying sequences of words, letters, or numbers; problems in reading comprehension; difficulty expressing thoughts in written or oral form; delayed spoken language; imprecise or incomplete interpretation of language that is heard; confusion about directions in space or time; confusion about right or left handedness; or difficulty with handwriting and mathematics.[108] One researcher has listed the following behavioral characteristics that are frequently, but not always, associated with children with learning disabilities:

- Excessive distractibility, or inability to concentrate on a learning task for the same length of time as other children
- Awkwardness in use of one's hands for either gross motor or fine motor tasks
- Difficulty in reading words on the blackboard, even with corrective lenses
- Excessive hyperactivity, or inability to stay in his or her seat in the school room
- Neurologic impairment caused by impairment in cranial nerve function, demonstrated in a neurologic exam
- Awkwardness of step or gait when walking.[109]

Regulations implementing Part B of the IDEA define "children with specific learning disabilities" as "those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations."[110] The disorders include conditions, such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.[111]

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[105] William N. Bender, "Learning Disabilities," ch. 14 in Phillip J. McLaughlin and Paul Wehman, *Mental Retardation and Developmental Disabilities*, 2nd ed. (Austin, TX: Proed, 1996), p. 259.

[106] Ibid., pp. 259–60.

[107] "Learning Disabilities: Glossary of Some Important Terms," ERIC Digest EDO–DC–92–7 (December 1992) (Reston, VA: Clearinghouse on Handicapped and Gifted Children, Council on Exceptional Children).

[108] *See generally* The Orton Dyslexia Society, *Dyslexia: Defining the Problem* (Baltimore, MD: Author).

[109] Bender, "Learning Disabilities," p. 264.

[110] 34 C.F.R. § 300.7(b)(10) (1996); *see also* Pub. L. No. 105–17, § 602(26)(A) (1997).

[111] 34 C.F.R. § 300.7(b)(10) (1996); *see also* Pub. L. No. 105–17, § 602(26)(B) (1997). Brain injury is the physical damage to brain tissue or structure that occurs before, during, or after birth. Minimal brain dysfunction is a medical and psychological term originally used to refer to the learning difficulties that seemed to result from identified or presumed damage to the brain. The term reflects a medical, rather than an educational or vocational orientation. Developmental aphasia is a severe

However, children with specific learning disabilities are not "children who have learning problems which are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage."[112] The definition of "specific learning disability" in the regulations implementing Part B of the IDEA reflects the essence of the advisory committee's first national definition, definitions used in State laws, and definitions or descriptions used by educational scholars. Common elements include: (1) language disorders and perceptual disorders as the leading components of the definition; (2) the concept of a significant discrepancy between academic achievement and potential to achieve; and (3) the exclusion of persons with mental retardation, or visual or hearing impairments.[113]

Behavioral Disabilities

Although neither Federal law nor regulations provide a definition for "behavioral disabilities," members of the education and psychology fields recognize the term behavior disorders.[114] There is disagreement, however, on whether behavior disorders are a separate and distinct category of disabilities or a broader category that includes those with emotional disturbance, social maladjustment, and attention deficit hyperactivity disorder.[115] Further, there is confusion and overlap in use of the terms "conduct disorders," "emotional disabilities," "behavioral disorders," "serious emotional disturbances," and "emotional and behavioral disorders" to describe students who exhibit similar traits.[116]

Generally, students with behavioral disorders demonstrate behavior that is noticeably different

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language disorder that is presumed to be due to brain injury rather than because of a developmental delay in the normal acquisition of language. "Learning Disabilities: Glossary of Some Important Terms." Perceptual handicaps and dyslexia are defined in the main text.

[112] 34 C.F.R. § 300.7(b)(10) (1996); *see also* Pub. L. No. 105–17, § 602(26)(C) (1997).

[113] Gearheart, *Special Education for the '80s*, p. 176 (citing Bailey, E., *Learning Disabilities Definitions in the Literature and State Regulations*. Unpublished study, University of Northern Colorado, 1977).

[114] *See* Michael Bullis and Hill M. Walker, "Behavior Disorders and the Social Context of Regular Class Integration: A Conceptual Dilemma," in John Wills Lloyd, Nirbhay N. Singh, and Alan C. Repp, eds., *The Regular Education Initiative: Alternative Perspectives on Concepts, Issues, and Models* (Sycamore, IL: Sycamore Publishing Co., 1991), pp. 75–93; Council for Children with Behavioral Disorders, "A Position Paper of the Council for Children with Behavioral Disorders," *Behavioral Disorders* (May 1985), p. 167; Council for Children with Behavioral Disorders, "Position Paper on Definition and Identification of Students with Behavior Disorders," *Behavioral Disorders* (November 1987), p. 9; "Behavioral Disorders: Focus on Change," ERIC Digest EDO-ED-93-1 (Reston, VA: Clearinghouse on Handicapped and Gifted Children, Council for Exceptional Children, 1993) (hereafter cited as "Behavioral Disorders: Focus on Change").

[115] *See generally* Elaine Clark, "Behavioral Disabilities," ch. 10 in Phillip J. McLaughlin and Paul Wehman, *Mental Retardation and Developmental Disabilities*, 2nd ed. (Austin, TX: Proed, 1996), pp. 187–91. Forness and Knitzer have described "behavior disorders" as "a generic, all-inclusive term used by special educators to denote disturbances of feelings, emotion, or behavior." Steven R. Forness and Jane Knitzer, "A New Proposed Definition and Terminology to Replace 'Serious Emotional Disturbance' in Individuals with Disabilities Education Act," *School Psychology Review*, vol. 21, no. 1 (1992), p. 13 (citing T.M. Achenbach, *Assessment and Taxonomy of Child and Adolescent Psychopathology* (Beverly Hills, CA: Sage, 1985)). Reid, Maag, and Vasa note, "[T]here is insufficient evidence to warrant a generalized medical model of all behavioral disorders or to imply that such problems exist within persons as do physical diseases." Robert Reid, John W. Maag, and Stanley F. Vasa, "Attention Deficit Hyperactivity Disorder as a Disability Category: A Critique," *Exceptional Children*, vol. 60, no. 3 (December 1993), p. 198 (citing T.M. Achenbach, "DSM–III in Light of Empirical Research on the Classification of Child Psychopathology," *Journal of the American Academy of Child Psychiatry*, vol. 19 (1980), pp. 395–412).

[116] "Behavioral Disorders: Focus on Change." Forness and Knitzer describe "conduct disorders" as "a specific psychiatric diagnosis in DSM–III–R" and "externalizing disorders" as "a term used by special educators to denote aggressive/disruptive behavior as opposed to internalizing disorders, that is, withdrawn/anxious behavior." Forness and Knitzer, "A New Proposed Definition," p. 13 (citing T.M. Achenbach, *Assessment and Taxonomy of Child and Adolescent Psychopathology* (Beverly Hills, CA: Sage, 1985). *See also* Frank H. Wood, "Issues in the Education of Behaviorally Disordered Students," in Margaret C. Wang, Maynard C. Reynolds, and Herbert J. Walberg, eds., *Special Education: Research and Practice: Synthesis of*

from that expected in school or the community. In some cases, students with behavioral disorders may be particularly uninvolved in their learning because of low self-regard, lack of a feeling of belonging to the school, and repeated failures in school.[117]

Emotional Disturbance

Educational and medical literature has offered many definitions of emotional disturbance. For example, emotional disturbance has been defined as "having moderate to marked reduction in behavioral freedom, which in turn, reduces [the person's] ability to function effectively in learning or working with others."[118] In children, emotional disturbance has been described as those who exhibit "conflict (nothing more or less) with their environment. They might be having a relationship problem with their teacher or a peer, they might be in conflict with themselves, or they may be victims of uncontrollable circumstances in their homes."[119] In addition, the emotionally disturbed pupil has been defined as "one who is persistently unable to cope with a reasonable school environment even though expectations are geared to his age and potential. . . . The specific patterns or manifestations of disturbance are many and range in depth."[120] Serious emotional disturbance also has been used synonymously with behavior disabilities by some researchers, who argue that behavior disorders and emotional disturbance, and at least one State (Utah) uses a behavior disordered category instead of the category for serious emotional disturbance.[121]

There are many reasons for the different definitions. Definitions may vary based on the discipline of the author, whether educator, psychiatrist, or clinical psychologist. Further, there is no agreement on terminology or descriptive phrases that are common among the differing definitions. There is disagreement on the degree of maladjustment needed to qualify as emotionally disturbed. Finally, there is disagreement on the number of inappropriate behaviors required to be considered emotionally disturbed.[122]

Federal regulations implementing Part B of the IDEA define "serious emotional disturbance" as

> a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance—
> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
> (C) Inappropriate types of behavior or feelings under normal circumstances;
> (D) A general pervasive mood of unhappiness or depression; or
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.[123]

Findings (New York, NY: Pergamon Press, 1990), p. 104 (noting that problems created by nonstandardized terminology and definitions for behaviorally disordered students has been discussed in education literature). *See also* Clark, "Behavioral Disabilities," pp. 187–91.

[117] "Behavioral Disorders: Focus on Change."

[118] Gearheart, *Special Education for the '80s*, p. 292 (citing N. Lambert and E. Bower, "In-School Screening of Children with Emotional Handicaps" in N.J. Long, W.C. Morse, and R.G. Newman, eds., *Conflict in the Classroom: The Education of Emotionally Disturbed Children* (Belmont, CA: Wadsworth Publishing Co., 1976)).

[119] Ibid., p. 249 (citing H.R. Reinert, *Children in Conflict: Educational Strategies for the Emotionally Disturbed and Behaviorally Disordered* (St. Louis: The C.V. Mosby Co., 1976), p. 6).

[120] Ibid. (citing W.C. Morse, "The Education of Socially Maladjusted and Emotionally Disturbed Children" in W.M. Cruickshank and G.O. Johnson, eds., *Education of Exceptional Children and Youth* (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1975), p. 556).

[121] *See* Clark, "Behavioral Disabilities," p. 188.

[122] Gearheart, *Special Education for the '80s*, p. 291.

[123] 34 C.F.R. § 300.7(b)(9) (1996).

The term includes schizophrenia but does not apply to "children who are socially maladjusted, unless it is determined that they have a serious emotional disturbance."[124]

This Federal definition has received a great deal of criticism. Because of concerns about the necessity of including the modifier "serious" in the definition,[125] Congress has dropped the term "serious" from the IDEA's definition of the term in the IDEA Amendments of 1997. Although the IDEA Amendments of 1997 has changed the term "serious emotional disturbance" to "emotional disturbance," the act's legislative history makes clear that Congress intended this change for a very limited reason. The Senate committee recommending the passage of the act noted in a report accompanying the Senate bill that this change was "intended to have no substantive or legal significance. It is intended strictly to eliminate the pejorative connotation of the term 'serious.' It should in no circumstances be construed to change the existing meaning of the term under 34 C.F.R. 300.7(b)(9) as promulgated September 30, 1992."[126]

Other criticisms of the term focus on the five criteria used in defining it in the Federal regulations issued in 1992 implementing Part B of the IDEA. Critics argue that these five criteria for serious emotional disturbance are not supported by research on children with emotional or behavioral disorders.[127] There also have been criticisms that the requirement of adverse educational performance is interpreted too narrowly "to mean just 'academic,' as opposed to 'social or behavioral,' performance."[128] There have been arguments that the five criteria and four limiting conditions[129] are illogical when considered together.[130] Moreover, the IDEA's 1997 reauthorization, which made substantial changes to the act, failed to include definitions for these five criteria or four limiting conditions.

A major criticism of the Federal definition that remained unresolved with the 1997 reauthorization of the act, has been on the exclusion of social maladjustment.[131] According to one scholar, exclusion of social maladjustment from the definition of serious emotional disturbance forces the diagnostic process into an adversarial mode because the parent will not feel free to divulge information to school personnel that would lead to a diagnosis of social maladjustment for fear of being misinterpreted, creating stigma for their child, or being judged on their parenting skills.[132]

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[124] *Id.* The National Mental Health and Special Education Coalition prefers the term "emotional or behavioral disorder" to serious emotional disturbance. *See* Forness and Knitzer, "A New Proposed Definition," pp. 12–20.

[125] *See* Forness and Knitzer, "A New Proposed Definition," p. 12; and Steven R. Forness, "Legalism Versus Professionalism in Diagnosing SED in the Public Schools," *School Psychology Review*, vol. 21, no. 1 (1992), p. 31 (hereafter cited as Forness, "Legalism Versus Professionalism").

[126] S. Rep. No. 105–17, at 7 (1997).

[127] Forness and Knitzer, "A New Proposed Definition," p. 13 (citing H.C. Quay, W.C. Morse, and R.L. Cutler, "Personality Patterns of Pupils in Special Classes for the Emotionally Disturbed," *Exceptional Children*, vol. 32 (1966), pp. 297–301; and M. Rutter, "Isle of Wight Revisited: Twenty-five Years of Child Psychiatric Epidemiology," *Journal of Child and Adolescent Psychiatry*, vol. 28 (1989), pp. 39–84)).

[128] Ibid.

[129] The four limiting conditions are (1) duration, "a long period of time"; (2) severity, "to a marked degree"; (3) adverse effect on educational performance; and (4) exclusion of social maladjustment unless serious emotional disturbance can also be determined. *See* 34 C.F.R. § 300.7(b)(9) (1996).

[130] Forness, "Legalism Versus Professionalism," p. 30. Some argue that the traditional diagnostic distinctions in psychiatry "may be completely useless in terms of their correspondence with SED criteria." As a result, "School psychologists must wrestle with ethical dilemmas almost daily because their clinical judgment in these cases is at odds with their legal responsibility, especially when statutes are both logically and empirically unsupported." Ibid., p. 32.

[131] *See* ibid., p. 30 (citing E.M. Bower, "Defining Emotional Disturbance: Public Policy and Research," *Psychology in the Schools*, vol. 19 (1982), pp. 55–60; D.H. Cline, "A Legal Analysis for Policy Initiatives to Exclude Handicapped/Disruptive Students from Special Education," *Behavioral Disorders*, vol. 15, pp. 159–73; and R. Skiba and K. Grizzle, "The Social Maladjustment Exclusion: Issues of Definition and Assessment," *School Psychology Review*, vol. 20 (1991), pp. 577–95).

Those who seek the inclusion of social maladjustment in the definition note that the original five criteria in the Federal definition for serious emotional disturbance were taken from a study in which children were considered on the basis of their social and emotional problems in school.[133] Further, they note that the second criterion, an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, is virtually synonymous with the term "social maladjustment."[134] They argue further that it therefore seems illogical and even contradictory to exclude the term "social maladjustment."[135] Proponents of including social maladjustment in the definition also note that many States do not exclude children with social maladjustment from their definitions of serious emotional disturbance.[136] On the basis of these concerns, one commentator has concluded that "[i]n short, the federal SED terminology and definition are currently neither clear nor comprehensive enough to determine appropriate eligibility in this category."[137]

Another reason why emotional and behavior disorders are included together is to acknowledge that behavioral manifestations of underlying emotional states can occur, particularly as early symptoms of severe disorders.[138] Those who oppose the current IDEA definition for serious emotional disturbance have noted that there are a number of problems with this terminology.[139] In response to these criticisms of the Federal definition, there have been proposals for changing the definition of serious emotional disturbance to "emotional or behavior disorder." Under one proposed definition, the term emotional or behavioral disorder would "mean a disability characterized by behavioral or emotional responses in school so different from appropriate age, cultural, or ethnic norms that they adversely affect educational performance."[140] Under this proposed definition, educational performance would include academic, social, vocational, and personal skills. In addition, such a disability would be more than a temporary, expected response to stressful events in the environment; it would be consistently exhibited in two different settings, at least one of which is school-related; and it would be unresponsive to direct intervention in general education or the child's condition in such that general education interventions would be insufficient. The proposed definition specifies that emotional and behavioral disabilities can coexist with other disabilities, and it may include children or youth with schizophrenic disorders, affective disorders, anxiety disorders, or other sustained disorders of conduct or adjustment when they adversely affect educational performance.[141]

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[132] Forness, "Legalism Versus Professionalism," pp. 31–32.

[133] Ibid., p. 29; Forness and Knitzer, "A New Proposed Definition," p. 13.

[134] Forness and Knitzer, "A New Proposed Definition," p. 13; and Forness, "Legalism Versus Professionalism," p. 29.

[135] Forness and Knitzer, "A New Proposed Definition," p. 13; and Forness, "Legalism Versus Professionalism," p. 2.

[136] Forness, "Legalism Versus Professionalism," p. 29 ("the fact that over 40 percent of states surveyed do not even attempt to exclude children with social maladjustment from the SED category in their definition is often ignored in the exclusion debate.") (citing P. Gonzales, *A Comparison of State Policy of the Federal Definition and a Proposed Definition of Serious Emotional Disturbance* (Alexandria, VA: National Association of State Directors of Special Education, 1991).

[137] Forness and Knitzer, "A New Proposed Definition," p. 13.

[138] Ibid., p. 14.

[139] *See* Forness and Knitzer, "A New Proposed Definition," pp. 12–13; Forness, "Legalism Versus Professionalism."

[140] Forness and Knitzer, "A New Proposed Definition," p. 13; Clark, "Behavioral Disabilities," p. 188.

[141] Ibid.

On the other hand, Congress continues to use the narrower definition of serious emotional disturbance. This definition specifically excludes socially maladjusted students. Moreover, at least one State, California, has considered codifying social maladjustment and behavior disorders as separate categories specifically excluded from the definition of serious emotional disturbance.[142] In a publication of the California Department of Education on State programs and services for students with serious emotional disturbances, the Special Education Division of California's State education agency makes a clear distinction between social maladjustment and serious emotional disturbance. This report distinguishes between "serious maladjustment" and "serious emotional disturbance" in a number of ways. For example, one of the criteria for severe emotional disturbance traditionally has been difficulty with or inability to develop satisfactory interpersonal relationships with peers.[143] The report states that in the case of students who are socially maladjusted, such students "often have *intact* peer relations particularly among a subculture with similar dissocial or antisocial values."[144] The report observes further that "[s]ocially maladjusted students may be characterized as *essentially normal* individuals who *choose* to break socially defined rules governing acceptable behavior."[145] However, the report cautions that "[s]chools should avoid identifying students who are followers or members of a fringe group as socially maladjusted when they may be, in fact, behavior disordered or emotionally disturbed."[146]

Despite the disagreements in terminology and definition, there is considerable agreement about general patterns or types of behavior characterizing students with emotional disturbance. Some students with emotional disturbance may be aggressive and disruptive, and they may act out their aggressions.[147] Others are withdrawn, anxious, and depressed.[148]

Attention Deficit Disorder or Attention Deficit Hyperactive Disorder

Attention deficit disorder (ADD) is a pervasive disorder in which the individual exhibits a number of symptoms. These symptoms can include inattention, impulsivity or the tendency to act impulsively, and, in some cases, hyperactivity.[149] ADD usually appears early in children. It can be identified as early as 3 years of age, and the symptoms can persist into adult life. The majority of students with ADD have significant and persistent problems in social relationships.

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[142] Forness, "Legalism Versus Professionalism," p. 33 (citing California State Department of Education, *California Programs and Services for Students with Serious Emotional Disturbances* (Sacramento, CA: Author, 1991) (hereafter cited as California State Department of Education, *California Programs and Services*)).

[143] California State Department of Education, *California Programs and Services*, p. 32.

[144] Ibid. (emphasis added).

[145] Ibid. (emphasis added).

[146] Ibid.

[147] Achenbach refers to these individuals as "externalizers." Quay identifies these qualities as one of four dimensions, and this dimension is the conduct disorder. "Emotional Disturbances," ERIC Digest E454 (Reston, VA: Clearinghouse on Handicapped and Gifted Children, Council for Exceptional Children, 1988) (hereafter cited as "Emotional Disturbances") (citing T.M. Achenbach, *Developmental Psychopathology* (New York: John Wiley & Sons, 1982); and H.C. Quay, "Patterns of Aggression, Withdrawal, and Immaturity" in H.C. Quay and J.S. Werry, eds., *Psychopathological Disorders of Childhood* (New York: John Wiley and Sons, 1972)).

[148] Achenbach refers to these individuals as "internalizers." Quay identifies these qualities as one of four dimensions, and this dimension is the personality disorder. "Emotional Disturbances" (citing T.M. Achenbach, *Developmental Psychopathology* (New York: John Wiley & Sons, 1982); and H.C. Quay, "Patterns of Aggression, Withdrawal, and Immaturity" in H.C. Quay and J.S. Werry, eds., *Psychopathological Disorders of Childhood* (New York: John Wiley and Sons, 1972)).

[149] *See* Mary Fowler, "Briefing Paper: Attention-Deficit/Hyperactivity Disorder," revised edition (Washington, DC: Academy for Educational Development, October 1994) (ERIC Document No. ED 378 729), pp. 2–5.

The behavior of individuals with ADD varies based on the type of ADD. Students with ADD with hyperactivity, a condition known as attention deficit hyperactivity disorder (ADHD), often are aggressive. Students with ADD without hyperactivity are more withdrawn. ADD without hyperactivity usually is less visible because the individual exhibits fewer activity and impulse-control problems. Teachers usually are able to recognize attention deficit disorder without hyperactivity during kindergarten through third grade.

The Diagnostic and Statistical Manuals of Mental Disorders (DSM), produced by the American Psychiatric Association, has provided the most widely accepted definitions of ADD and ADHD. In the 1980 version of the DSM, known as DSM–III, only the diagnosis of ADD existed. An individual could be diagnosed as ADD with or without hyperactivity. An ADD diagnosis was based on a judgment that an individual exhibited a minimum number of 14 behavioral symptoms. Of the 14 total symptoms, 5 related to inattention, 5 related to impulsivity, and 4 related to hyperactivity. If an individual exhibited at least three of the inattention symptoms, at least three of the impulsivity symptoms, and at least two of the hyperactivity symptoms, the individual was diagnosed as ADD with hyperactivity. If the individual presented three or more of the inattention and impulsivity symptoms but only one or no hyperactivity symptoms, the individual was diagnosed as ADD without hyperactivity. However, because of concerns and criticisms about the validity of the ADD without hyperactivity diagnosis, the American Psychiatric Association's 1987 manual, DSM–III–R, specified that the presence of any 8 of the total 14 symptoms would meet the criteria for a diagnosis of attention deficit hyperactive disorder (ADHD).[150]

The latest Diagnostic and Statistical Manual of Mental Disorders (DSM–IV), issued in 1994, does not distinguish between ADD and ADHD. The manual defines "Attention-Deficit/Hyperactivity Disorder" (ADD/ADHD) as "a persistent pattern of inattention and/or hyperactivity-impulsivity that is more frequent and severe than is typically observed in individuals at a comparable level of development."[151] ADD/ADHD can be diagnosed if a child presents six or more out of nine symptoms of inattention or six or more out of nine symptoms of hyperactivity-impulsivity. In addition, some of these symptoms must have been present before the child reached age 7, the symptoms must be present in two or more settings (e.g., school and home), and "there must be clear evidence of clinically significant impairment in social, academic, or occupational functioning."[152] The symptoms also must not be associated with the individual having several other disorders, such as pervasive developmental disorder or schizophrenia.[153]

It remains unclear whether ADD/ADHD is a behavioral disability. There is an overlap in the symptoms associated with ADD/ADHD and behavior disorders.[154] In addition, the American Psychiatric Association's DSM-IV manual recognizes categories called "Conduct Disorder," "Oppositional Defiant Disorder," and "Disruptive Behavior Disorder," and classifies all of these along with ADD/ADHD as "Attention-Deficit and Disruptive Behavior Disorders".[155] ADD/ADHD also has considerable overlap with learning disability and some would argue that students with ADD/ADHD are a subcategory of students with learning disabilities. Approximately 40 percent of students diagnosed as having ADD/ADHD also meet the criteria for being diagnosed as learning disabled.[156] There are references, however, to ADD as a disability separate and distinct from disruptive behavior disorders.[157] In particular, in the late 1980s and early 1990s, there was an effort to have ADHD recognized as a separate disability category in the IDEA, as a psychiatric/mental disorder.[158]

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[150] James D. McKinney, Marjorie Montague, and Anne M. Hocutt, "Educational Assessment of Students with Attention Deficit Disorder," *Exceptional Children*, vol. 60 (October 1993), p. 125 (hereafter cited as McKinney et al., "Educational Assessment of Students with Attention Deficit Disorder"); Robert Reid, John W. Maag, and Stanley F. Vasa, "Attention Deficit Hyperactivity Disorder as a Disability Category: A Critique," *Exceptional Children*, vol. 60, no. 3 (December 1993), p. 198 (hereafter cited as Reid et al., "Attention Deficit Hyperactivity Disorder"). The 1987 manual listed a separate category of undifferentiated attention deficit disorder (UADD) which had no diagnostic criteria and which included attention deficits unaccompanied by symptoms of hyperactivity. Because there was no diagnostic criteria for UADD, it became "an ill-defined, heterogeneous category." As a result, there was little research into ADD without hyperactivity. McKinney, et al., "Educational Assessment of Students with Attention Deficit Disorder," p. 125.

[151] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Washington, DC: American Psychiatric Association, 1994), p. 78 (hereafter cited as DSM–IV).

[152] Ibid., pp. 83–85.

[153] Ibid.

The U.S. Department of Education (DOEd) has specified that ADD/ADHD can be classified as a "specific learning disability," a "serious emotional disturbance," or "other health impairment" to receive coverage under the IDEA. Neither the IDEA nor section 504 recognizes ADD/ADHD as a separate disability category or as a behavioral disability.[159] Some studies recognize ADD as distinct from learning disabilities and emotional disorders but note that ADD/ADHD can occur simultaneously with these disabilities. For example, there are reports that ADD/ADHD can occur simultaneously with learning disabilities in at least 10 percent to 20 percent of cases when stringent identification criteria are applied for both conditions.[160] The co-occurrence of ADD/ADHD and emotional disorders is less frequent, although it is more significant among girls with ADD/ADHD who are approaching adolescence.[161]

Equal Educational Opportunity for Students with Disabilities

Legislative and Rulemaking History

> This Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue. . . . Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the Government

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[154] Reid et al., "Attention Deficit Hyperactivity Disorder," p. 198 (citing S.P. Hinshaw, "On the Distinction Between Attentional Deficits/Hyperactivity and Conduct Problems/Aggression in Child Psychopathology," *Psychological Bulletin*, vol. 101 (1987), pp. 443–63).

[155] DSM–IV, p. 14. *See also* Keith McBurnett, Benjamin B. Lahey, and Linda J. Pfiffner, "Diagnosis of Attention Deficit Disorders in DSM–IV: Scientific Basis and Implications for Education; Diagnostic and Statistical Manual of Mental Disorders," *Exceptional Children*, vol. 60 (October 1993), p. 108.

[156] Bender, "Learning Disabilities," pp. 260–61.

[157] *See* McKinney et al., "Educational Assessment of Students with Attention Deficit Disorder," p. 125.

[158] Reid et al., "Attention Deficit Hyperactivity Disorder," p. 198.

[159] *See* Robert R. Davila, Assistant Secretary, Office of Special Education and Rehabilitative Services, Michael L. Williams, Assistant Secretary, Office for Civil Rights, and John T. MacDonald, Assistant Secretary, Office of Elementary and Secondary Education, memorandum to Chief State School Officers, "Clarification of Policy to Address the Needs of Children with Attention Deficit Disorders with General and/or Special Education," Sept. 16, 1991.

[160] McKinney et al., "Educational Assessment of Students with Attention Deficit Disorder," p. 125. Various studies have found the co-occurrence of ADD/ADHD and learning disabilities to exist in 9 percent to as high as 63 percent of cases. Ibid. (citing J.D. McKinney, M. Montague, and A.M. Hocutt, "Educational Characteristics of Students with Attention Deficit Disorder," Proceedings of the National Forum on the Education of Children with Attention Deficit Disorder (Washington DC: Chesapeake Institute, 1993)).

[161] McKinney et al., "Educational Assessment of Students with Attention Deficit Disorder," p. 125.

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to merely establish an unenforceable goal requiring all children to be in school.[162]

Educational opportunities for students with disabilities developed slowly. This is evident in the history of public education for students with disabilities.[163] With enactment of the Elementary and Secondary Education Act in 1965 and subsequent amendments in the early 1970s, the Federal Government assumed an active role in providing educational opportunities to children and youths with disabilities.[164] Congress viewed Federal programs as essential to the educational development of these children and youths who otherwise would have few or no such opportunities.[165]

The Federal Government took its first steps in ensuring the right of students with disabilities to *equal* educational opportunity by enacting section 504 of the Rehabilitation Act of 1973.[166] With this provision, it prohibited exclusion from participation in, denial of the benefits of, or discrimination under any federally assisted program, solely by reason of an individual's disability.[167] Among the concerns prompting section 504 was the failure of public schools to serve children who were classified as mentally retarded, who had physical disabilities, or who were considered emotionally disturbed.[168] Consequently, members of Congress proposed a nondiscrimination provision that would protect individuals with disabilities, as a 1972 amendment to the Civil Rights Act of 1964.[169] Although this effort failed, the provision was enacted 1 year later as part of a comprehensive revision to federally assisted rehabilitation programs for persons with disabilities.[170] The provisions of section 504 received little emphasis in the legislative history of the Rehabilitation Act of 1973.[171] Most of the history of the act emphasized improvements to adult education and training programs designed to rehabilitate individuals with disabilities and to prepare them for employment and self-sufficiency.[172] The Senate report preceding the act does note that members of Congress added the nondiscrimination provision to "mak[e] employment and participation in society more feasible for handicapped individuals."[173]

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[162] S. Rep. No. 168, 94th Cong., 1st Sess., 9 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433.

[163] *See* discussion above, pp. 11–16.

[164] *See* H. Rep. No. 805, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4093, 4138–4139 ("When the 89th Congress created the Bureau of Education for the Handicapped in 1967, it did so for the purpose of finding ways to speed Federal participation in the solutions of the educational problems of handicapped children. Since that time, the basic goal of the Federal effort in education for the handicapped has been articulated as being to assist States to provide each handicapped child with his rightful opportunity to an education.").

[165] *See* H. Rep. No. 805, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4093, 4115 ("the rationale of the Congress was that, unlike the majority target population under Title I, the handicapped in public facilities, particularly the largest group—the mentally retarded, are largely dependent upon those funds for any educational opportunity").

[166] Pub. L. No. 93–112, § 504, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (1994)). When enacted in 1973, the statute prohibited only federally assisted programs from discriminating. Federally conducted was not added to the statute until 1978.

[167] *Id.* In 1978, section 504 was extended to cover federally conducted programs as well.

[168] Weber, *Special Education Law and Litigation Treatise*, p. 1:14. Weber notes that Senator Humphrey stressed these concerns in his original description of the bill. *Id.* (citing 118 Cong. Rec. 525 (1972)).

[169] *See* 118 Cong. Rec. 525–26 (1972) (statements of Senator Humphrey on S. 3044).

[170] *See generally* S. Rep. No. 318, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076, 2077–90 (discussing history of law). *See also* Weber, *Special Education Law and Litigation Treatise*, pp. 1:13–14.

[171] *See* 41 Fed. Reg. 20,296 (1976) ("There is almost no substantive legislative history surrounding the development and enactment of section 504. There were, for example, no public hearings accompanying the original bills, and there was almost no substantive floor debate.").

[172] Hearings on a number of House and Senate bills that preceded passage of the act revealed four main concerns. First, changes were needed to the Vocational Rehabilitation program to ensure that the program would better meet its goal of providing

Although section 504 provided civil rights protections to students with disabilities in public elementary and secondary schools receiving Federal financial assistance, it offered only a partial means for these students to receive equal educational opportunity.[174] By 1974, Congress began to recognize that something more than a prohibition of exclusion, denial, or discrimination on the basis of a person's disability was needed. To promote equal educational opportunity, the Federal Government sought to ensure that all children and youth with disabilities had a free appropriate public education. In addition, in developing the law and policy, the Federal Government considered other principles to be crucial to equal educational opportunity, many of which had been incorporated in the court orders for the *P.A.R.C.* and *Mills* cases.[175] These principles included nondiscriminatory testing and evaluation materials; placement and education of students with disabilities in classes with nondisabled students;[176] educational instruction and curricula matching the student's unique needs and abilities;[177] procedures for reevaluating the student periodically to ensure that his or her instruction met existing needs and abilities;[178] safeguard procedures for ensuring the involvement of students with disabilities and their parents in decisions on identification, evaluation, and placement;[179] proper training of teachers who instruct students with disabilities;[180] appropriate resources and facilities to educate students with disabilities; and access for students with disabilities to career opportunities.[181]

In fulfilling these goals, Congress created an amendment to the Education of the Handicapped Act that "establishe[d] for the first time in federal policy that handicapped children are entitled to an appropriate free public education."[182] It expanded State grants programs that served to catalyze the growth of State and local educational

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more comprehensive rehabilitation services to individuals with disabilities. Second, the program often served only those who were easiest to serve; consequently, the program was not reaching the population who most needed services, the severely disabled. Third, there was a lack of followup after individuals with disabilities were placed in employment, resulting in a lack of additional services while on the job and job loss. Fourth, there was a lack of support for organized and coordinated research and training on the part of the Rehabilitation Services Administration. *See* S. Rep. No. 318, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076, 2086.

[173] S. Rep. No. 318, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076, 2092.

[174] The Senate Committee on Labor and Public Welfare's report that preceded passage of the Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, notes:
"Parents of handicapped children all too frequently are not able to advocate the rights of their children because they have been erroneously led to believe that their children will not be able to lead meaningful lives. However, over the past few years, parents of handicapped children have begun to recognize that their children are being denied services which are guaranteed under the Constitution. It should not, however, be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy. It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity." S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433.

[175] *See* 343 F. Supp. 279, 302 (E.D. Pa. 1972); 348 F. Supp. 866, 877–80 (D.D.C. 1972).

[176] *See* 343 F. Supp. 866, 879.

[177] *See id.* at 279, 302.

[178] *See id.* at 279, 301–303.

[179] *See id.* at 279, 301; 348 F. Supp. 866, 879–880.

[180] *See* 343 F. Supp. 279, 313; 348 F. Supp. 866, 879.

[181] *See* 343 F. Supp. 279, 296.

[182] H. Rep. No. 805, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4093, 4146.

programs for children and youth with disabilities.[183] It required States to adopt and implement the policy of providing for a free appropriate public education for all children and youth with disabilities.[184] It required States to submit a description of the kind and number of facilities, personnel, and services necessary through the State to provide free appropriate educational opportunities for all children with disabilities.[185] Further, it required States "to provide procedures for insuring that handicapped children and their parents are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement of handicapped children; . . . procedures to insure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped; and procedures to insure that testing and evaluation materials and procedures . . . selected and administered so as not to be racially and culturally discriminatory."[186] Congress extended authorization for discretionary grant programs, such as programs for training personnel for the education of children and youth with disabilities[187] and programs of research and demonstration projects in educating children and youth with disabilities.[188] These provisions were enacted as part of the Education Amendments of 1974, extending the Education of the Handicapped Act of 1970.[189]

One year later, Congress realized that further provisions were necessary "[i]n order to carry . . . these provisions into actual delivery of services" and to ensure that the provisions were enforceable.[190] With the Education for All Handicapped Children Act of 1975 (later renamed the IDEA), Congress sought to "assure the right to education for handicapped children . . . and to establish a process by which State and local educational agencies may be held accountable for providing educational services for all handicapped children."[191] To accomplish this task, Congress created a condition for providing Federal funding. To be eligible for funding, States had to "have a 'right to education' policy"[192] that "assures all handicapped children the right to a free appropriate public education." Further, the act established a timetable requiring States to assure that "a free appropriate public education [would] be available for all handicapped children between the ages of three and eighteen within the State not later than

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[183] Pub. L. No. 93–380, § 614, 88 Stat. 484. *See also* H. Rep. No. 805, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4093, 4139; and S. Conf. Rep. No. 1026, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4093, 4257.

[184] Pub. L. No. 93–380, § 615(b), 88 Stat. 484. H. Rep. No. 805, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4093, 4146; and S. Conf. Rep. No. 1026, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4093, 4257. *See also* S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1427.

[185] Pub. L. No. 93–380, § 615(b), 88 Stat. 484. H. Rep. No. 805, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4093, 4146–47. *See also* S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1427.

[186] Pub. L. No. 93–380, § 614, 88 Stat. 484. *See also* S. Conf. Rep. No. 1026, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4093, 4257; and S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1427.

[187] Pub. L. No. 93–380, § 618, 88 Stat. 484. S. Conf. Rep. No. 1026, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4093, 4258–59.

[188] Pub. L. No. 93–380, §§ 619–620, 88 Stat. 484. S. Conf. Rep. No. 1026, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4093, 4259.

[189] Pub. L. No. 93–380, §§ 611–621, 88 Stat. 484. *See also* S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1427.

[190] S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1427. *See also* Weber, *Special Education Law and Litigation Treatise*, p. 1:5 (1992) ("the law did not provide the enforceability that advocates believed was necessary.").

[191] S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1427. *See* Pub. L. No. 94–142, § 3, 89 Stat. 773.

[192] S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1427.

September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980."[193]

One year following enactment of the Education for All Handicapped Children Act, the U.S. Department of Health, Education, and Welfare (HEW) began soliciting comments on its proposed regulations implementing section 504.[194] Although the express language of section 504 only prohibited exclusion from participation in, denial of the benefits of, or discrimination under any federally assisted program on the basis of an individual's disability, HEW expanded the regulations and modeled them after the standards set forth in the Education of the Handicapped Act of 1970 and its subsequent amendments.[195] HEW sought to hasten full compliance with equal educational opportunity, as reflected in statements accompanying the Notice of Intent to Issue Proposed Rules:

> the proposed regulation will not be the sole means of achieving the goal of equal educational opportunity for all handicapped children. Rather, it will be one of a number of powerful forces all advocating approximately the same objective. The role of HEW in enforcing this subpart [on preschool, elementary, secondary, and adult education programs] can, therefore, be viewed as one of hastening and helping to enforce full compliance with the goal of equal educational opportunity for all handicapped children. . . .
>
> This role of hastening compliance should not be considered a relatively unimportant one. Experience in the District of Columbia and other areas which have been subject to court orders suggests that local agencies may take very long periods of time to actually comply unless they are faced with strong incentives to do so.[196]

On August 23, 1977, to implement the Education for All Handicapped Children Act (later the IDEA), HEW issued regulations that would become effective on October 1, 1977.[197] Because of the "potential impact that [the act] [would] have on the education of handicapped children throughout the Nation, and on the agencies that serve them," HEW conducted a "massive effort" to obtain comments and suggestions for developing regulations.[198] The Department's Office of Education,[199] conducted 20 meetings at which 2,200 people participated. It convened a writing group of approximately 170 people to develop concept papers for use as the basis of the regulations. It received over 1,600 written comments during the 60-day comment period, and it conducted a national conference on the proposed regulations for administrators of various State educational agencies.[200]

Like the act, the final regulations included provisions that were designed: "(1) to assure that all handicapped children have available to them a free appropriate public education; (2) to assure that the rights of handicapped children and their parents are protected; (3) to assist States and localities to provide for the education of handicapped children; and (4) to assess and assure the effectiveness of efforts to educate such children."[201] In addition, they included other detailed provisions. For example, the regulations required each public agency to ensure that "removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[202] They required "each public agency [to] take steps to insure that its handicapped children have available to them the variety of educational programs and services available to non-handicapped children. . ., including art, music, industrial arts, consumer and homemaking education, and vocational education." They also required agencies to "take steps to provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities."[203]

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[193] Pub. L. No. 94–142, § 5(a), 88 Stat. 780. The act included an exception with respect to handicapped children aged 3 to 5 and aged 18 to 21 such that the requirement would not be applicable to States if was contrary to State law or practices, or any order of a court regarding public education for these age groups. *Id.*

[194] *See* 41 Fed. Reg. 20,296 (1976).

[195] 41 Fed. Reg. 20,302 (1976).

[196] 41 Fed. Reg. 20,341 (1976).

[197] *See* 42 Fed. Reg. 42,474–42,518 (1977).

[198] 42 Fed. Reg. 42,474 (1977).

[199] In 1980, Congress abolished the Department of Health, Education, and Welfare and created two separate departments, the U.S. Department of Health and Human Services and the U.S. Department of Education. The Department of Education was created as a successor to the Office of Education. Pub. L. No. 96–88, 93 Stat. 668.

[200] 42 Fed. Reg. 42,474 (1977).

Federal Laws

Three Federal laws have helped to advance the goal of equal educational opportunity for children and youth with disabilities: section 504 of the Rehabilitation Act of 1973 (section 504),[204] the Individuals with Disabilities Education Act (IDEA),[205] and Title II of the Americans with Disabilities Act of 1990.[206]

Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973[207] is a civil rights law protecting individuals with disabilities. Like Title VI of the Civil Rights Act of 1964[208] and Title IX of the Education Amendments of 1972,[209] section 504 prohibits discrimination in federally assisted programs or activities.[210] Unlike Title VI and Title IX, section 504 also prohibits discrimination under federally conducted programs or activities.[211] Specifically, section 504 provides that:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[212]

The statute does not expressly address conduct in the context of public elementary and secondary education, although the provision would apply to any program or activity relating to public elementary or secondary education as long as that program or activity receives Federal financial assistance. Section 504 defines "program or activity" to mean "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government" or "a local educational agency . . ., system of vocational education, or other school system."[213] It, therefore, includes the operations of a State department of education, special school districts, and public elementary and secondary school systems.

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[201] *Id.*

[202] 42 Fed. Reg. 42,497 (1977).

[203] 42 Fed. Reg. 42,488–42,489 (1977).

[204] 29 U.S.C. § 794 (1994).

[205] Pub. L. No. 105–17, §§ 601–687 (1997).

[206] 42 U.S.C. §§ 12,131–12,165 (1994).

[207] Pub. L. No. 93–112, § 504, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794(a)-(d) (1994)).

[208] 42 U.S.C. §§ 2000d *et seq.* (1994). Title VI prohibits exclusion from participation in, denial of the benefits of, or discrimination under any program or activity receiving Federal financial assistance, on the basis of race, color, or national origin. *Id.*

[209] 20 U.S.C. §§ 1681 *et seq.* (1994). Title IX prohibits exclusion from participation in, denial of the benefits of, or discrimination under any program or activity receiving Federal financial assistance, on the basis of sex. *Id.*

[210] 29 U.S.C. § 794(a)-(c) (1994).

[211] *Id.*

[212] *Id.*

The Individuals with Disabilities Education Act

The IDEA differs from section 504 in that it does not prohibit discrimination against individuals with disabilities.[214] The IDEA is a statute comprised of several grant programs, some distributing funds based on a formula, such as Part B and Part H, and others on a discretionary basis, such as by competition. Part B of the IDEA is a formula grant program to provide assistance to States in educating students with disabilities.[215] In addition, there are discretionary grant programs to fund regional resource and Federal centers that provide information, technical assistance, and training on special education and related services and early intervention services.[216] There also are discretionary grant programs to fund: (1) services for deaf-blind children and youth;[217] (2) programs to fund and improve early intervention, transitional, and postsecondary education services for children and youth with disabilities;[218] (3) programs for children and youth with emotional disturbance;[219] (4) personnel training for educating children and youth with disabilities;[220] (5) parent training and information programs, community/parent resource centers, and technical assistance for parent training and information centers;[221] (6) national clearinghouses for dissemination of information relating to children and youth with disabilities, the provision of postsecondary services for individuals with disabilities, and careers in special education;[222] (7) research and innovation in educating and improving educational services to individuals with disabilities;[223] (8) technology development, demonstration, utilization, and educational media services for individuals with disabilities;[224] and (9) programs for infants and toddlers with disabilities.[225]

With the enactment of the IDEA Amendments of 1997, Congress changed the IDEA's funding formula to undo incentives that existed under the previous formula for school districts to overidentify students for placement in special education in order to receive Federal funds under the IDEA.

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[213] *Id.* § 794(b).

[214] As part of the Commission's statutory enforcement report on the implementation, compliance, and enforcement by the U.S. Department of Education of civil rights laws, this chapter focuses primarily on the activities of the Department's Office for Civil Rights (OCR). Because OCR does not have responsibility for implementing or enforcing the IDEA, this statute will be discussed only generally as it relates to specific issues in this chapter and OCR's work relating to section 504.

[215] Pub. L. No. 105–17, §§ 611–619 (1997).

[216] *Id.* § 685 (1997).

[217] *Id.* § 661(i)(1), § 685(c)(2)(B), (C) (1997).

[218] *Id.* §§ 671–674, 681–687 (1997).

[219] *Id.* §§ 661(i)(1)(C), 672(a)(4) (1997).

[220] *Id.* § 673 (1997).

[221] *Id.* §§ 682–684 (1997).

[222] *Id.* §§ 682(b)(6), 685(d) (1997).

[223] *Id.* § 672 (1997).

[224] *Id.* § 687 (1997).

[225] *Id.* §§ 631–645.

The new law attempts to remove the direct relationship that existed previously between the amount of Federal funding received under Part B of the IDEA and the number of students placed in special education.[226]

The primary program of the IDEA that most directly advances the educational opportunities of children and youth with disabilities is Part B, a State grant program providing Federal funds to supplement State and local efforts in educating children and youth with disabilities aged 3 to 21.[227] Part B of the IDEA Amendments of 1997 has updated and expanded on the four main purposes of Part B outlined in the IDEA of 1990.[228] The IDEA Amendments of 1997 lists the following as the main purposes of Part B:

(1) to ensure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;

(2) to ensure that the rights of children with disabilities and their parents or guardians are protected;

(3) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(4) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(5) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(6) to assess and assure the effectiveness of efforts to educate children with disabilities.[229]

To fulfill these purposes, Part B of the IDEA Amendments of 1997 requires State education agencies and elementary and secondary schools to take certain actions.

The State education agency, or State department of education, as the agency may be known in some States, must demonstrate "to the satisfaction of the Secretary" of the U.S. Department of Education, that the State "has in effect policies and procedures to ensure" that it meets certain conditions necessary to fulfill the purposes of Part B.[230] Among the conditions the State must show that it has met are the following:

- [a] free appropriate education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been expended or expelled from school information showing that the State has in effect a policy that ensures that all children with disabilities have the right to a free appropriate public education;[231]

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[226] *See* S. Rep. No. 105–17, at 9. The report of the U.S. Senate elaborated on how the funding incentives under the previous law might lead to overidentification of students for special education services: "While it is unlikely that individual educators ever identify children for the additional funding that such identification brings, the financial incentive reduces the proactive scrutiny that such referrals would receive if they did not have the additional monetary benefit. It also reduces the scrutiny of children who might be moved back out of special education. In-State funding formulas that follow the [] disability-based Federal child-count formula further reduce such scrutiny, with more children being identified to draw additional State funds." Ibid.

[227] Pub. L. No. 105–17, §§ 611–619 (1997).

[228] The four main purposes were: (1) to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs; (2) to assure that the rights of children with disabilities and their parents or guardians are protected; (3) to assist States and localities to provide for the education of all children with disabilities; and (4) to assess and assure the effectiveness of efforts to educate children with disabilities. 20 U.S.C. § 1400(c) (1994).

[229] Pub. L. No. 105–17, § 601(d) (1997).

[230] Pub. L. No. 105–17, § 612(a) (1997). The U.S. Department of Education regulations implementing the IDEA contain a similar requirement. *See* 34 C.F.R. § 300.110 (1996).

- [t]he State has established a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal;[232]

- [a]ll children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services;[233]

- [a]n individualized education, or an individualized family service plan . . . is developed, reviewed, and revised for each child with a disability;[234]

- [policies and procedures to ensure that] [t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily are educated with children who are nondisabled;[235]

- [procedural safeguards to ensure the due process rights for children with disabilities and their parents including] [p]rocedures to ensure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child;[236]

- [t]he State has in effect . . . a comprehensive system of personnel development that is designed to ensure an adequate supply of qualified special education, regular education, and related services personnel.[237]

- a description of the procedures and activities the State will undertake to ensure that an adequate supply of qualified personnel necessary to carry out the purposes of Part B.[238]

DOEd's implementing regulations for the IDEA of 1990 set forth similar requirements to the ones listed above.[239] The IDEA Amendments of 1997 and the implementing regulations for the IDEA of 1990 require that elementary and secondary schools applying to the States for Part B funds at the local level must include similar information in their applications to demonstrate that they have instituted policies and procedures necessary to fulfill the purposes of Part B.[240]

In terms of the actual services provided, each child and youth with disabilities, aged 3 to 21, should have available to her or him a "free appro-

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[231] Pub. L. No. 105–17, § 612(a)(1)(A) (1997).

[232] *Id.* § 612(a)(2) (1997).

[233] *Id.* § 612(a)(3)(A) (1997).

[234] *Id.* § 612(a)(4) (1997).

[235] *Id.* § 612(a)(5)A) (1997).

[236] *See id.* § 612(a)(6)(B) (1997).

[237] *Id.* § 612(a)(14) (1997).

[238] *See id.* § 613(a)(3)(A) (1997); 34 C.F.R. §§ 300.121(a), 300.122(a), 300.123, 300.125, 300.126, 300.128(a), 300.130(a), 300.131, 300.132(a), 300.381 (1996).

[239] *See* 34 C.F.R. §§ 300.121(a), 300.122(a), 300.123, 300.125, 300.126, 300.128(a), 300.130(a), 300.131, 300.132(a), 300.381 (1996).

[240] *See generally* Pub. L. No. 105–17, § 613 (1997); 34 C.F.R. §§ 300 220, 300.222–300.224, 300.226–300.227, 300.235, 300.237 (1996).

priate public education."[241] The school system must provide each child a free appropriate education "at public expense, under public supervision and direction, and without charge."[242] All of the provisions required by Part B, such as the States' and local school systems' applications for Part B funds, and the requirement to provide students with disabilities a free appropriate public education, are conditions to receipt of Federal funds under the Part B State grant program.

The Americans with Disabilities Act

Title II of the Americans with Disabilities Act (ADA)[243] prohibits discrimination on the basis of a person's disability in all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies. Unlike section 504, protection under Title II of the ADA is not dependent on a State or local government's receipt of Federal financial assistance. The provisions of Title II apply regardless of the receipt of Federal funding.[244] There is no specific provision in Title II of the ADA directed at public elementary and secondary schools. However, OCR considers that Title II incorporates the substantive requirements of section 504 with respect to the provision of educational services to elementary and secondary students.

Costs of Special Education

Much of the contemporary debate on special education surrounds the costs of educating students with disabilities. As the number of students identified as having disabilities nationwide has grown, local expenditures on special education have increased. In this environment, questions have arisen as to who should pay the costs of special education (Federal, State, or local governments), whether the expenditures can be reduced, and whether the rising expenditures have lessened expenditures on regular education. Although the cost of special education is not directly a civil rights matter, it is within the context of the contemporary debate on costs that the questions of ensuring nondiscrimination and equal educational opportunity for students with disabilities are being addressed.

Relative Costs of Educating Students with Disabilities

Although the costs of educating students with disabilities cannot be measured easily, a 1988 study funded by DOEd estimated that, on average, the cost of educating students with disabilities is 2.3 times the cost of educating students who do not receive special education and related services.[245] In 1993, a review of the literature on the costs of special education concluded that evidence from the 1988 study as well as several other studies pointed to a relatively constant or slightly increasing cost ratio over time.[246]

A number of factors contribute to the higher cost of educating students with disabilities. Students with disabilities placed in separate classes may have lower pupil-teacher ratios than students in regular education.[247] Furthermore, schools may have to spend money, in addition to staff cost, on assessment of students with disabilities and on other supplemental services not needed by students without disabilities. If the school district in which a student with a disability resides cannot meet the student's needs, the school district may place the student at a private school or facility at public expense as a means of providing special education and related services to those students. Students publicly placed at private schools must receive all necessary special education and related services at public expense, including needed transportation. In addition to providing special education to students with disabilities, schools may need to provide "related services," such as physical therapy, occupational therapy, speech/language pathology, or medical care to these students.[248]

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[241] Pub. L. No. 105–17, § 612(a)(1)(A) (1997); 34 C.F.R. § 300.300 (1996).

[242] *See* Pub. L. No. 105–17, § 601(8)(A) (1997); 34 C.F.R. § 300.301 (1996).

[243] 42 U.S.C. § 12,131–12,165 (1994).

[244] *See* Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to OCR Senior Staff, Nov. 19, 1992 *reprinted in* 19 IDELR 860.

[245] Mary T. Moore, E. William Strang, Myron Schwartz, and Mark Braddock, *Patterns in Special Education Service Delivery and Cost* (Washington, DC: Office of Special Education and Rehabilitative Services, U.S. Department of Education, December 1988), p. iv (hereafter cited as Moore et al., *Patterns in Special Education Service Delivery and Cost*).

[246] Stephen Chaikind, Louis C. Danielson, and Marsha L. Brauen, "What do We know about the Costs of Special Education? A Selected Review," *The Journal of Special Education*, vol. 26, no. 4 (1993), p. 366 (hereafter cited as Chaikind et al., "What do We know about the Costs of Special Education?").

[247] *See* Moore et al., *Patterns in Special Education Service Delivery and Cost*, pp. 41–53.

In an illustration of the comparative costs of educating actual children with disabilities, the Minnesota Department of Education used profiles detailing the resources and services used.[249] The base of comparison was a second grade student without a disability enrolled in a school district's regular education program. The following are descriptions of services (and costs) provided to children with three types of disabilities:

1. Child with Special Learning Disability
This child experienced reading difficulties in the first grade and was given extra tutoring and consultant services. Curriculum-based assessments were administered several times each school quarter. The net cost to the school district was $550.[250]

2. Child with Moderate Mental Disability
This second grader was working at the pre-kindergarten level. She was not completely toilet trained and was essentially non-verbal. She was being integrated into the regular classroom with the help of a paraprofessional and also spent nine hours each week with a resource teacher and additional time weekly in speech and language therapy. The cost to the school district was $4,549.[251]

3. Child with Emotional/Behavioral Disability
The child attended a semi-segregated tuition program attached to a regular elementary school. He did not participate in any regular classroom but spent several hours weekly with a behavioral specialist. Although academically bright with an above-average intelligence, he was hyperactive and spent 40–50 percent of classroom time out of his seat. His best work was accomplished on a one-to-one basis. The cost to the school district was $7,764.[252]

Increasing Expenditures on Special Education

The Federal Government never has funded IDEA's Part B program fully and the Federal share of expenditures on special education has remained stable since the 1980s. However, local expenditures on special education have risen steadily since the enactment of the Education for All Handicapped Children Act. Expenditures on special education have risen faster than those on regular education, and, as a result, special education's share of education expenditures has risen over time.[253] A 1995 study of a representative sample of school districts across the Nation

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248 Ibid., pp. 65–84.

249 Margaret J. Mclaughlin and Sandra Hopfengardner Warren, "The Costs of Inclusion: Reallocating Financial and Human Resources to Include Students with Disabilities," *The School Administrator* (November 1994), p. 14 (citing George Holt, *Regular Education and Special Education: Individual Student Analysis of Costs Data* (St. Paul, MN: Minnesota Department of Education, 1991)).

250 Ibid.

251 Ibid., p. 15.

252 Ibid.

253 *See* Chaikind et al., "What do We know about the Costs of Special Education?" pp. 344–45. *See also* Hamilton Lankford and James Wyckoff, "The Allocation of Resources to Special Education and Regular Instruction," in Helen F. Ladd, ed., *Holding Schools Accountable: Performance-Based Reform in Education* (Washington, DC: The Brookings Institution, 1996), p. 230 (discussing special education expenditures for the State of New York).

found that the share of education expenditures going to special education increased from 4 percent to 17 percent between 1967 and 1991 and that 38 percent of net increases in schooling expenditures over the period went to special education.[254] Increases in expenditures on special education can result from growth in the number of students receiving special education and related services, from increases in per pupil expenditures on students receiving special education, or both.[255] For instance, a study of special education expenditures in New York City Public Schools found that 79 percent of the growth in special education spending between 1980 and 1985 was the result of increased enrollment, with the remainder being due to higher expenditures per pupil.[256] During the subsequent periods 1985–1989 and 1989–1993, increased expenditures per pupil, rather than increased enrollments in special education, accounted for the increases in special education spending in New York City.[257]

Nationally, the growth in the number of children and youth with disabilities entering public schools has been a prime factor increasing the expenditures on educating children.[258] Data indicate that in 1975, the year the Education of All Handicapped Children Act was enacted, 3.48 million students with disabilities were enrolled in public schools. Since 1975, public schools have faced increasing enrollments of children and youth requiring special education and related services, even as total pupil enrollments have declined.[259] In New York City, the number of special education students has increased from 40,000 to 165,000 in the past two decades, although total enrollment declined by 100,000.[260] At the national level, during the 1976–1977 school year, 3.7 million disabled children were enrolled in special education programs. Three years later, in 1979–1980, the number of students in special education had increased to more than 4.0 million, an 8 percent increase.[261] Growth in disability enrollments continued steadily; and by the 1989–1990 school year, approximately 4.6 million students were in special education programs.[262] By the 1992–93 school year, more than 5.1 million students were in federally supported programs for students with disabilities,[263] and by the 1993–1994 school year approximately 5.4 million children with disabilities were in the Nation's public schools.[264]

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[254] Richard Rothstein with Karen Hawley Miles, *Where's the Money Gone? Changes in the Level and Composition of Education Spending* (Washington, DC: Economic Policy Institute, 1995), p. 1.

[255] *See* Lankford and Wyckoff, "The Allocation of Resources to Special Education," p. 249 (finding that increases in special education expenditures in New York City public schools between 1980 and 1993 were due to "increasing expenditures per disabled students and an increasing number of students with disabilities".).

[256] Ibid., p. 235.

[257] Ibid.

[258] *See* chap. 3, pp. 48–53.

[259] Sam Allis, "The Struggle to Pay for Special Education," *Time*, Nov. 4, 1996, pp. 82–83 (hereafter cited as Allis, "The Struggle to Pay for Special Education").

[260] Allis, "The Struggle to Pay for Special Education," pp. 82–83.

[261] *See* U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics 1995*, by Thomas D. Snyder et al. (Washington, DC: Government Printing Office, October 1995), table 51, p. 65 (hereafter cited as NCES, *Digest of Education Statistics 1995*); DOEd, National Center for Education Statistics, *Condition of Higher Education 1996* (Washington, DC: Government Printing Office, June 1996), table 38–1, p. 262 and table 43–1, p. 272 (hereafter cited as NCES, *Condition of Higher Education 1996*).

[262] *See* NCES, *Digest of Education Statistics 1995*, table 51, p. 65; NCES, *Condition of Higher Education 1996*, table 38–1, p. 262 and table 43–1, p. 272.

[263] Ibid.

Overall, between 1977 and 1994, enrollment of students with disabilities in public schools increased from 3.7 million to 5.4 million, while total pupil enrollment decreased from 49.4 million to 48.9 million. In the 1993–1994 school year, 11.8 percent of all students were served in federally supported special education programs, up from 8.3 percent in 1976–1977.[265] The high growth in the number of students identified as having disabilities, particularly the growth in the number of students identified as having learning disabilities or attention deficit hyperactivity disorder, has raised concerns that schools are overidentifying students with disabilities and that they may be placing students in special education "simply as a way to avoid dealing with difficult students."[266]

Along with increased enrollment in special education, costs per student also have been an important factor in increasing expenditures in educating students with disabilities. In 1996, a researcher at the Center for Special Education Finance estimated that expenditures per student for students with disabilities are "growing at a rate somewhere between 20 to 100 percent faster" than per-student expenditures for students in regular education.[267] Expenditures per student in special education may have increased over time either because the number of students with high-cost disabilities has increased or because the costs for special education and related services, such as the provision of special medical services and alteration of buildings, has increased.[268]

Federal Funding Commitment and Share of Expenditures

With the enactment of the IDEA,[269] the Federal Government took on a responsibility to assist State and local governments in funding the costs of special education.[270] The IDEA established a formula grants program—Part B: Assistance for Education of All Handicapped Children—that was designed to assist States in fulfilling their constitutional responsibility to educate students with disabilities.[271] In enacting the IDEA, the

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[264] Ibid.

[265] *See* NCES, *Digest of Education Statistics 1995*, table 51, p. 65 and table 3, p. 12; NCES, *Condition of Higher Education 1996*, table 38–1, p. 262 and table 43–1, p. 272.

[266] Rene Sanchez, "Inside Education: Generating a New Message on Special Education Aid, Hill Revising Rules as Enrollment Climbs," *The Washington Post*, June 20, 1996, p. A25.

[267] Thomas B. Parrish, *Special Education Finance: Past, Present, and Future* (Palo Alto, CA: Center for Special Education Finance, May 1996), p. 18.

[268] *See* James E. Ysseldyke and Bob Algozzine, *Special Education: A Practical Approach for Teachers*, 34d ed. (Boston, MA: Houghton Mifflin, 1995), p. 507.

[269] Pub. L. No. 94–142, 89 Stat. 775.

[270] As early as the 1960s, the Federal Government began providing financial assistance for students with disabilities under Title VI of the Elementary and Secondary Education Act (Pub. L. 89–750, 80 Stat. 1204–08). Congress authorized $50 million for fiscal year 1967 and $150 million for fiscal year 1968 to assist States in enhancing and initiating educational programs for students with disabilities. *Id.* However, the actual amounts appropriated for these 2 fiscal years were far less than the amounts authorized—$2.5 million for fiscal year 1967 and $14.25 million for fiscal year 1968, or 2 percent and 10 percent, respectively, of the original authorizations. *See* Rosemary C. Salomone, *Equal Education Under the Law: Legal Rights and Federal Policy in the Post-Brown Era* (New York: St. Martin's Press, 1986). p. 144 (hereafter cited as Salomone, *Equal Education*). *See also* pp. 16–21 above (discussing the evolution from Title VI of the ESEA to the IDEA).

[271] Steven Aleman, *Special Education: Issues in the State Grant Program of the Individuals with Disabilities Education Act* (Washington, DC: Congressional Research Service, Mar. 20, 1995), p. 15 (citing Smith v. Robinson, 468 U.S. 992, 1009 (1984)). Congress recognized that States might have difficulty implementing the constitutional requirement to provide education to disabled students. Laura F. Rothstein, *Special Education Law* (New York: Longman, 1995), p. 14.

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Federal Government promised a "fiscal partnership" with States to support these provisions.[272]

Since the enactment of the Education for All Handicapped Children Act (renamed the IDEA in 1990), the Part B formula grant program has been the primary source of Federal aid to State and local education agencies for instructional and support services for children and youth with disabilities from birth to age 21.[273] Under the IDEA of 1990, Federal funds were distributed to States based on a "flat" reimbursement—an equal amount was provided for each student enrolled in special education regardless of the type, cost, or duration of services.[274] Each State received a share of the total amount of money appropriated for Part B that was proportional to the number of children in the State between the ages of 3 and 21 receiving special education and related services.[275] States had to distribute at least 75 percent of the amount received from the Federal Government under Part B to local education agencies[276] in an amount proportional to the number of children in the local education agency receiving special education and related services.[277] When the Education for All Handicapped Children Act was originally enacted, Congress intended that, by fiscal year 1982, the total Federal payment to States would amount to 40 percent of the national average per pupil expenditure in public elementary and secondary schools, multiplied by the number of students between the ages of 3 and 21 receiving special education and related services.[278] However, the program never has been fully funded at the Federal level.[279] Congressional authorizations have never exceeded 12.5 percent of the national average per pupil expenditure in public elementary and secondary schools, multiplied by the number of students between the ages of 3 and 21 receiving special education and related services.[280] Since the late 1980s, the Federal appropriation to States, through the IDEA Part B Grants to States program, for educating students with disabilities has remained relatively stable at 8 percent of the national average per pupil expenditure in public elementary and secondary schools.[281]

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[272] Goldman, "A Free and Appropriate Education," p. 246.

[273] Deborah Verstegen, *Fiscal Provisions of the Individual with Disabilities Education Act: Historical Overview*, Policy Paper 2 (Palo Alto, CA: American Institutes for Research, Center for Special Education Finance, June 1994), p. 1 (hereafter cited as Verstegen, *History of IDEA*).

[274] Goldman, "A Free and Appropriate Education," p. 252 (citing 20 U.S.C. § 1411 (1994)).

[275] *See* 20 U.S.C. § 1411(a)(1) (1994). The number of eligible students in each State was the number of children with disabilities receiving special education and related services on December 1 of the fiscal year preceding the grant year. *Id.* § 1411(a)(1)(3). However, States were limited in the number of children they could count as "disabled" for receiving Federal funds. States were not provided funding for disabled children in excess of 12 percent of the State's child population. *Id.* § 1411(a)(5).

[276] 20 U.S.C. § 1411(c)(1) (1994).

[277] *Id.* § 1411(d) (1994). However, if a local education agency received less than $7,500, the local education agency was not eligible for Federal funding. *Id.* § 1411(c)(4).

[278] *Id.* § 1411(a)(1)(B)(v) (1994).

[279] Salomone, *Equal Education*, p. 147. According to Goldman, similar to the promise of a fiscal partnership, IDEA's promise of educational rights for all children and youth with disabilities remains unfulfilled. Based on 1990 data, in several States, implementation of the act is considered incomplete; and almost 4 million children (almost 45 percent of those with disabilities) are not receiving the educational services that their disabilities require. In addition, about 1 million youngsters with disabilities are totally excluded from public schools. *See* Goldman, *A Free and Appropriate Education*, p. 245 (citing 20 U.S.C. § 1400(b)(3) (1994)). Although all 50 States receive funding for IDEA, many are not in full compliance with the procedures of the act. *See* Goldman, *A Free and Appropriate Education*, p. 252.

[280] This occurred in fiscal year 1979. *See* Aleman, *Special Education*, p. 19; *see also* Salomone, *Equal Education*, p. 147.

[281] Steven R. Aleman, Congressional Research Service, telephone interview, Nov. 3, 1996. *See also* Aleman, *Special Education*, p. 19 and Thomas B. Parrish and Deborah A. Verstegen, *Policy Issues*

In revising the funding formula with the IDEA Amendments of 1997, Congress sought particularly to address the continuing problem of overidentification of minority children, especially African American boys, for special education services.[282] The IDEA Amendments of 1997 retains the child count-based formula used under the IDEA of 1990 until the appropriation for Part B of the IDEA reaches $4,924,672,200.[283] This threshold will trigger a change in the funding formula for distributing funds to States. Yearly child counts based on disability no longer will determine a State's funding allotment.[284] Under the new formula, the State's allotment will be determined based on two calculations: (1) the amount allocated to the State in the year before the threshold amount was reached; and (2) "85 percent of any remaining funds to States on the basis of their relative populations of children aged 3 through 21 who are of the same age as children with disabilities for whom the State ensures a free appropriate public education" and "15 percent of those remaining funds to States on the basis of their relative populations of children . . . who are living in poverty."[285] The statute states that for the purpose of making grants under this section, "the Secretary shall use the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary."[286]

The legislative history of the IDEA Amendments of 1997 indicates that Congress changed the formula for allocating Part B funds to States "to address the problem of overidentification of children with disabilities."[287] The House and Senate reports accompanying the final version of the IDEA Amendments bill stated that:

> the growing problem is over identifying children as disabled when they might not be truly disabled. The challenge today is not so much how to provide access to special education services but how to appropriately provide educational services to children with disabilities in order to improve educational results for such children. As States consider this issue, more and more States are exploring alternatives for serving more children with learning problems in the regular educational classroom. But in doing so, they face the prospect of reductions in Federal funds, as long as funding is tied to disabled child counts.[288]

By changing from a formula based on State child counts identifying certain children as having a disability, to a formula "of which 85 percent of additional funds is based on the total school age population and 15 percent is based on the poverty statistic for children in a State,"[289] the congressional committee responsible for the 1997 IDEA legislation stated that it had "squarely faced this problem."[290]

The House and Senate reports accompanying the IDEA Amendments of 1997 observed further that:

> Based on the significant progress that has been made in providing access to special education and concerns about the over-identification of children as disabled, the committee believes this new formula will address many of these concerns. This change will enable States

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[282] Ibid.

[283] Pub. L. No. 105–17, § 611 (1997); *see also* H. Rep. No. 105–95, at 88 (1997); S. Rep. No. 105–17, at 8 (1997).

[284] Pub. L. No. 105–17, § 611(d), (e) (1997); H. Rep. No. 105–95, at 88 (1997); S. Rep. No. 105–17, at 8 (1997).

[285] Pub. L. No. 105–17, § 611(e)(3)(i) (1997); *see also* H. Rep. No. 105–95, at 88 (1997); S. Rep. No. 105–17, at 8 (1997).

[286] Pub. L. No. 105–17, § 611(e)(3)(ii) (1997).

[287] H. Rep. No. 105–95, at 88 (1997); S. Rep. No. 105–17, at 9 (1997).

[288] H. Rep. No. 105–95, at 89 (1997); S. Rep. No. 105–17, at 9 (1997).

[289] Ibid.

[290] Ibid.

> to undertake good practices for addressing the learning needs of more children in the regular classroom without unnecessary categorization or labeling thereby risking the loss of Federal funds. Changing the Federal formula may also motivate States to change their own formulas for distributing State aid in ways that eliminate inappropriate financial incentives for referring children to special education.[291]

The change to the new formula will be triggered once Federal funding reaches the targeted threshold of approximately $4.9 billion. However, fiscal year 1997 appropriations for the IDEA Part B Grants to States program (approximately $3.1 billion) fall far short of the threshold. Given the current climate of budget cutting, it does not seem likely that the $4.9 billion threshold appropriation level will be reached anytime soon. Furthermore, when it does take effect, it only will be amounts above this threshold that will be allocated according to the new funding formula. Thus, although the change in the funding formula may have beneficial results, it probably will not reach children in schools in the near future.

The IDEA, Section 504, and the Principles of Equal Educational Opportunity

The Education for All Handicapped Children Act, now the IDEA,[292] section 504, and their respective implementing regulations, have been, since their creation, the most influential pieces of Federal legislation and policy to effect positive change in the education of students with disabilities. They have provided a means for students with disabilities to gain equal access to the curricula, classes, activities, and services available to nondisabled students. They have provided these students with rights to a free appropriate education that addresses the students' unique needs. Further, they have given students with disabilities and their parents rights requiring the students to be properly identified, evaluated, and placed and afforded an appropriate public education.

A primary reason that these laws and regulations have been so effective in promoting equal educational opportunity for students with disabilities is that they have advanced principles essential to that concept. These principles include the following:

(1) utilizing neutral and nondiscriminatory diagnostic and screening procedures when placing students in educational programs;

(2) structuring educational programs designed to serve a diverse student population by maintaining a primary objective to place students in regular classes to the greatest extent possible, designing programs to reflect a student's different abilities in various subjects, and reevaluating students periodically to reflect both the different abilities in various subjects and changes in achievement, performance, and development;

(3) providing parental notification and ensuring that institutional programs facilitate and encourage the involvement of parents in their children's education;

(4) evaluating the training and certification of teachers, evaluating facilities and other resources, and allocating teachers, facilities and other resources prior to the development and during the implementation of all educational programs; and

(5) eliminating barriers, providing access to all subjects, activities, and career opportunities for each student, and counseling each student to maximize his or her potential.

An important aspect of these laws and regulations is that they offer more than guidance for school systems in addressing the principles. The IDEA requires States to ensure that elementary and secondary school systems implement these principles in accordance with statutory and regulatory requirements. In this way, IDEA, its regulations, and the Department of Education's section 504 regulations have a strong influence on the educational opportunities offered to students with disabilities.

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[291] H. Rep. No. 105–95, at 89–90 (1997); S. Rep. No. 105–17, at 10 (1997).

[292] *See* discussion above on the renaming of the act, p. 20.

Chapter 3

National Statistical Trends for Students with Disabilities

This chapter focuses specifically on characteristics of and educational programs for students with specific learning disabilities, serious emotional disturbance (SED), behavioral disorders,[1] and students who are classified as having mental retardation.[2] Students with specific learning disabilities, serious emotional disturbance, or mental retardation are the most prevalent among beneficiaries of special education services.[3] Similar to their peers served entirely by regular educational programs, students with disabilities have diverse demographic characteristics and approaches to learning effectively and efficiently. They receive instruction from educators (e.g., teachers, aides, and other personnel) who have various credentials and experiences. Moreover, students with disabilities also attain a range of results as they progress through school and as they exit their formal public K–12 education.

The Number of Children and Youth with Disabilities

Since the enactment of the Education for all Handicapped Children Act in 1975 (renamed as the IDEA in 1990),[4] the total number of students participating in the nation's programs for children with disabilities (such as those funded by IDEA, Part B, and/or other, more general federally funded programs (such as those funded by Title I)), has increased each year, despite an overall decline in K–12 enrollment. In the 1994–95 school year, 4.9 million children and youth aged 6 to 21 were served under the IDEA, Part B program (see table 3.1).[5] In the previous year, 5.4

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[1] Provisions in the IDEA and/or regulations implementing Part B of the IDEA define the terms "specific learning disabilities," "mental retardation," and "serious emotional disturbance," and they include these types of disabilities in the definition of "children with disabilities." The term "behavioral disorders" is not defined in the IDEA nor in the implementing regulations, nor is it included in the definition of "children with disabilities." *See* Pub. L. No. 105–17, § 602(3)(A) (1997); 34 C.F.R. § 300.7(a)(1),(5),(9) & (10) (1996).

[2] Data on students classified as "mentally retarded" can be based on data about one or a combination of each level of mental retardation (mild, moderate, severe, and profound).

[3] Data on the number of beneficiaries of federally supported special education programs reveal that students with specific learning disabilities, serious emotional disturbance, and mental retardation are among the three most frequently identified and represented disabilities. *See* U.S. Department of Education (DOEd), National Center for Education Statistics, *Digest of Education Statistics 1996*, by Thomas D. Snyder et al. (Washington, DC: Government Printing Office, November 1996), table 51, p. 65 (hereafter cited as DOEd, *Digest of Education Statistics 1996*).

[4] IDEA previously was enacted as the Education for All Handicapped Children Act (EHCA) of 1975, Pub. L. No. 94–142, 89 Stat. 773. Congress renamed the EHCA as the IDEA in 1990. The IDEA was reauthorized as the IDEA Amendments of 1997 (*see* Pub. L. No. 105–17 (1997)).

[5] *See* DOEd, *To Assure the Free Appropriate Education of All Children with Disabilities: Eighteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, DC, 1996), table AA1, p. A–1 and table AA2, p. A–2 (hereafter cited as DOEd, *1996 IDEA Report*). Note that the year 1994–1995 is the most recent year for data on the number of students with disabilities served under IDEA, Part B.

TABLE 3.1

Number of Children and Youth From Birth Through Age 21[1] with Disabilities Served in Federally Supported Programs,[2] by Type of Disability: 1976–1977 to 1994–1995

(Number served in thousands)

	All disabilities	Specific learning disabilities	Serious emotional disturbance	Mental retardation
1976-1977	3,692	796	283	959
1977-1978	3,751	964	288	933
1978-1979	3,889	1,130	300	901
1979-1980	4,005	1,276	329	869
1980-1981	4,142	1,462	346	829
1981-1982	4,198	1,622	339	786
1982-1983	4,255	1,741	352	757
1983-1984	4,298	1,806	361	727
1984-1985	4,315	1,832	372	694
1985-1986	4,317	1,862	375	660
1986-1987	4,374	1,914	383	643
1987-1988	4,447	1,928	373	582
1988-1989	4,544	1.987	376	564
1989-1990	4,641	2,050	381	548
1990-1991	4,762	2,130	390	534
1991-1992	4,949	2,234	399	538
1992-1993	5,125	2,354	401	519
1993-1994	5,373	2,444	414	554
1994-1995	4,915	2,514	428	571

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[1] For 1994-1995, the reported data (all disabilities and by disability category) are based on those children between the ages of 6 and 21. Before 1987-1988, students classified as "preschool disabled" were included in the reported counts of children served in federally supported programs, by disabling condition (and for all disabilities combined). Therefore, between 1976-1977 and 1986-1987 the reported number of children with each specific disability (and for all disabilities combined) was based on the number between the ages of 0 and 21. Starting in 1987-1988, States no longer were required to report the number of preschool (ages 0 to 5) children by disabling condition. Instead, the disabilities of children between birth and age 5 are counted under the one category "preschool disabled." Therefore, as of 1987-1988, the reported number of students with a particular disability includes only those children between the ages of 6 and 21. However, the number of children with all disabilities between the years 1976-1977 and 1993-1994 continues to include those in the preschool disabled category, and therefore represents children between the ages of birth through 21.

[2] Data for 1976-1977 through 1993-1994 include students with disabilities served under Title 1 and Individuals with Disabilities Education Act (IDEA), formerly the Education of the Handicapped Act. The data (all disabilities and each specific category) for 1994-1995 include 6- to 21-year-old students with disabilities served under IDEA, Part B only.

Source: For years before 1994-1995, U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics 1996*, by Thomas D. Snyder et al. (Washington, DC: Government Printing Office, November 1996), table 51, p. 65. For 1994-1995, U.S. Department of Education, *To Assure the Free Appropriate Education of All Children with Disabilities: Eighteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, DC, 1996), table AA1, p. A-1, table AA2, p. A-2.

million children and youth from birth to age 21 received services funded by IDEA, Part B, and/or Title I, up from 3.7 million in 1976–1977 (see table 3.1).[6]

Students with learning disabilities are one of the fastest growing groups of disabled students being served by federally aided special education programs. In 1994–1995, 2.5 million 6- to 21-year-olds with learning disabilities participated in programs funded by IDEA, Part B (table 3.1).[7] In 1993–1994, 2.4 million children and youth aged 6 to 21 with a specific learning disability received special education and related services funded by IDEA, Part B, and/or participated in programs funded by Title I, up from 2.0 million in the 1989–1990 school year, 1.6 million in 1981–1982, and fewer than 0.8 million in 1976–1977.[8] (See table 3.1.)

In contrast, the number of students classified as mentally retarded served in federally supported programs has declined since the mid-1970s. In 1994–1995, 571,000 6- to 21-year-olds classified as having various forms of mental retardation (ranging from educable mental retardation to forms requiring life support care) were enrolled in programs funded by IDEA, Part B (table 3.1).[9] In 1993–1994, 554,000 children and youth aged 6-to-21 who had mental disabilities (which were classified under the overall heading "mental retardation") were served in federally supported programs, down from 643,000 in 1986–1987, and 959,000 in 1976–1977.[10] (See table 3.1.)

The number of children and youth aged 6 to 21 with serious emotional disturbance who were served by federally supported programs, rose during the 19-year period, from 283,000 in 1976–1977 to 350,000 in 1982–1983, and 414,000 in 1993–1994 (see table 3.1).[11] In 1994–1995, 428,000 students with serious emotional disturbance participated in special education programs funded by IDEA, Part B (see table 3.1).[12]

Students with Disabilities Served as a Percentage of Total Public School Enrollment

In the 1993–1994 school year, children and youth from birth through age 21 with disabilities accounted for 12 percent of enrollment in the Nation's public schools,[13] up from 11 percent in

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[6] *See* DOEd, *The Digest of Education Statistics 1996*, table 51, p. 65. Note that the number of children with disabilities for the 1976–1977 through 1986–1987 school years includes a small number of children under the age of 6.

[7] *See* DOEd, *1996 IDEA Report*, table AA2, p. A–2.

[8] *See* DOEd, *Digest of Education Statistics 1996*, table 51, p. 65. Note that before 1987–1988, the reported numbers of children by disability included all children from birth to age 21, not just children between the ages of 6 and 21.

[9] *See* DOEd, *1996 IDEA Report*, table AA2, p. A–2.

[10] *See* DOEd, *Digest of Education Statistics 1996*, table 51, p. 65. Note that before 1987–1988, the reported numbers of children by disability included all children from birth to age 21, not just children between the ages of 6 and 21. Also, although the number of children classified as mentally retarded declined between 1976–1977 and 1992–1993, it rose between 1992–1993 and 1994–1995.

[11] *See* DOEd, *Digest of Education Statistics 1996*, table 51, p. 65. Note that before 1987–1988, the reported numbers of children by disability included all children from birth to age 21, not just children between the ages of 6 and 21.

[12] *See* DOEd, *1996 IDEA Report*, table AA2, p. A–2.

[13] For 1976–1977 through 1993–1994: The data presented in this section are calculated as the number of children and youth with disabilities between birth (or for specific disabilities, age 6) and age 21 who receive federally supported services as a percentage of the estimated public school enrollment in pre-K through grade 12. For 1994–1995: The data presented in this section are calculated as the number of children and youth with disabilities between age 6 and 21 who are served under IDEA, Part B, as a percentage of the estimated public school enrollment in pre-K through grade 12. Other sources use the number of children with disabilities (who are served under IDEA, Part B) between the ages of 6 and 17 when comparing the number of children with disabilities to public school enrollment. *See*, for instance, DOEd, *1996 IDEA Report*, table AA13, pp. A–40-A–42. Because the 6–17 age group is more restrictive than the birth-to-age 21 age group, using this age group yields a small figure for the proportion of students being served in special education.

1984–1985, and 8 percent in 1976–1977.[14] Similarly, the representation of children and youth aged 6-to-21 with *specific* disabilities among the total enrollment of public school students has changed. For instance, between 1976–1977 and 1994–1995, as more children and youth with learning disabilities became identified and were served by special education services, their representation among all public school students increased from 1.8 percent to 5.7 percent (see table 3.2). Also, the decrease in the number of mentally retarded children and youth aged 6 to 21 receiving special education services during the same period lowered their share in the total public school enrollment—from 2 percent to 1 percent (see table 3.2). Although the representation of SED children and youth among all publicly educated elementary and secondary students rose during the 19-year period, it remained below 1 percent of all students enrolled in the Nation's public schools (see table 3.2).

Disabilities of Students in Special Education

The largest group of students receiving special education services are students with specific learning disabilities. Furthermore, they are one of the fastest growing groups among students with different categories of disabilities. The percentage of disabled children and youth from birth through age 21 served by Part B of IDEA and/or Title I, due to being identified as having specified learning disabilities, more than doubled between 1976–1977 (22 percent) and 1993–1994 (46 percent).[15] (See table 3.3.)

One possible explanation for this increase is that since the field of learning disabilities is relatively new, with each successive year, school personnel and parents become more adept at recognizing children with specific learning disabilities.[16] Another possible explanation is that within the past two decades, there have been various changes in social and cultural structure in the Nation, increased levels of poverty and of substance abuse among pregnant women, and diminished social support systems—changes that can bring about an increased prevalence of specific learning disabilities.[17] A final possible explanation is that, in some States where local school districts receive higher funding for placing students in special education rather than in general population classes, there may be a tendency to overidentify students as learning disabled.

The proportion of children and youth from birth through age 21 with disabilities classified as

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Also note that not all students with disabilities who participate in federally supported programs are enrolled in public schools. Students with disabilities can receive special education and related services at the public's expense (utilizing sources such as IDEA, Part B and Title I, as well as State and local school district funds) in private schools (including those outside of their home school district). Some of these children and youth attend private schools if their home school districts do not have a public school program to meet their respective educational needs. For instance, in 1993–1994, 0.60 percent of 6- to 11-year-olds, and 1.23 percent of 12- to 17-year-olds with all disabilities (who participated in programs funded by IDEA, Part B and/or Title 1) were enrolled in separate private facilities. *See* DOEd, *1996 IDEA Report*, table AB4, p. A–75 and table AB5, p. A–101. *See also* 34 C.F.R., Subpart D, § 300.400—§ 300.452; and Pub. L. No. 105–17, § 612(a)(10). The year 1993–1994 is the most recent year of data on the number of the Nation's students with disabilities who were educated in various environments.

[14] *See* table 3.2. *See also* DOEd, *Digest of Education Statistics 1996*, table 51, p. 65. The figures for the 1994–1995 school year are based on a calculation of the count of children and youth with disabilities between the ages of 6 and age 21 served under IDEA, Part B, divided by the estimated public school enrollment for that year (44,109 thousand students). *See* DOEd, *1996 IDEA Report*, table AA1, p. A–1 and table AA2, p. A–2 and DOEd, *Digest of Education Statistics 1996*, table 3, p. 12 (enrollment data).

[15] DOEd, *Digest of Education Statistics 1996*, table 51, p. 65.

[16] DOEd, *1995 IDEA Report*, p. 13.

[17] Ibid.

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TABLE 3.2

Children and Youth From Birth Through Age 21[1] with Disabilities Served in Federally Supported Programs,[2] by Type of Disability: 1976–1977 to 1994–1995

(Number served as percentage of total enrollment[3])

	All disabilities	Specific learning disabilities	Serious emotional disturbance	Mental retardation
1976–1977	8.33	1.80	0.64	2.16
1977–1978	8.61	2.21	0.66	2.14
1978–1979	9.14	2.66	0.72	2.12
1979–1980	9.62	3.06	0.79	2.09
1980–1981	10.13	3.58	0.85	2.03
1981–1982	10.47	4.05	0.85	1.96
1982–1983	10.75	4.40	0.89	1.91
1983–1984	10.95	4.60	0.92	1.85
1984–1985	11.00	4.67	0.95	1.77
1985–1986	10.95	4.72	0.95	1.68
1986–1987	11.00	4.81	0.96	1.62
1987–1988	11.11	4.82	0.93	1.45
1988–1989	11.30	4.94	0.94	1.40
1989–1990	11.44	5.06	0.94	1.35
1990–1991	11.55	5.17	0.95	1.30
1991–1992	11.77	5.31	0.95	1.28
1992–1993	11.97	5.50	0.94	1.21
1993–1994	12.23	5.57	0.95	1.23
1994–1995	11.14	5.70	0.97	1.29

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[1] Before 1987-1988, students classified as "preschool disabled" were included in the reported counts of children served in federally supported programs, by disabling condition (and for all disabilities combined). Therefore, between 1976-1977 and 1986-1987 the reported number of children with each specific disability (and for all disabilities combined) was based on the number between the ages of 0 and 21. Starting in 1987-1988, States no longer were required to report the number of preschool (ages 0 to 5) children by disabling condition. Instead, the disabilities of children between birth and age 5 are counted under the one category "preschool disabled." Therefore, as of 1987-1988, the reported number of students with a particular disability only includes children between the ages of 6 and 21. However, the number of children with all disabilities between the years 1976-1977 and 1993-1994 continues to include those in the preschool disabled category, and therefore represents children between the ages of birth through 21.

[2] Data for 1976-1977 through 1993-1994 include students with disabilities served under Title 1 and Individuals with Disabilities Education Act (IDEA), formerly the Education of the Handicapped Act. The data (all disabilities and each specific category) for 1994-1995 include 6- to 21-year-old students with disabilities served under IDEA, part B only.

[3] Based on enrollment in public schools, kindergarten through 12th grade, including a relatively small number of pre-kindergarten students.

Source: For years before 1994-1995, U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics*, by Thomas D. Snyder et al. (Washington, DC: Government Printing Office, November 1996), table 51, p. 65; for 1994-1995, U.S. Department of Education, *To Assure the Free Appropriate Education of All Children with Disabilities: Eighteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, DC, 1996), table AA1, p. A-1 and table AA2, p. A-2; and U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics*, by Thomas D. Snyder et al. (Washington, DC: Government Printing Office, November 1996), table 3, p. 12 (enrollment data).

TABLE 3.3
Children and Youth From Birth Through Age 21[1] with Disabilities Served in Federally Supported Programs,[2] by Type of Disability: 1976-1977 to 1993-1994

(Percentage distribution of children served)

	All disabilities	Specific learning disabilities	Serious emotional disturbance	Mental retardation	Other disabilities
1976–1977	100.0	21.6	7.7	26.0	44.7
1977–1978	100.0	25.7	7.7	24.9	41.7
1978–1979	100.0	29.1	7.8	23.2	39.9
1979–1980	100.0	31.9	8.2	21.8	38.2
1980–1981	100.0	35.3	8.4	20.0	36.3
1981–1982	100.0	38.6	8.1	18.7	34.6
1982–1983	100.0	40.9	8.3	17.8	33.0
1983–1984	100.0	42.0	8.4	16.9	32.7
1984–1985	100.0	42.4	8.6	16.1	32.9
1985–1986	100.0	43.1	8.7	15.3	32.9
1986–1987	100.0	43.8	8.8	14.7	32.7
1987–1988	100.0	43.4	8.4	13.1	35.1
1988–1989	100.0	43.6	8.3	12.7	35.4
1989–1990	100.0	44.2	8.2	11.8	35.8
1990–1991	100.0	44.7	8.2	11.2	35.9
1991–1992	100.0	45.1	8.1	10.9	35.9
1992–1993	100.0	45.9	7.8	10.1	36.2
1993–1994	100.0	45.5	7.8	10.3	36.4

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[1] Before 1987-1988, students classified as "preschool disabled" were included in the reported counts of children served in federally supported programs, by disabling condition (and for all disabilities combined). Therefore, between 1976-1977 and 1986-1987 the reported number of children with each specific disability (and for all disabilities combined) was based on the number between the ages of 0 and 21. Starting in 1987-1988, States no longer were required to report the number of preschool (ages 0 to 5) children by disabling condition. Instead, the disabilities of children between birth and age 5 are counted under the one category "preschool disabled." Therefore, as of 1987-1988, the reported number of students with a particular disability only includes children between the ages of 6 and 21. However, the number of children with all disabilities between the years 1976-1977 and 1993-1994 continues to include those in the preschool disabled category, and therefore represents children between the ages of birth through 21.

[2] Data for 1976-1977 through 1993-1994 include students with disabilities served under Title 1 and Individuals with Disabilities Education Act (IDEA), formerly the Education of the Handicapped Act.

Source: U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics 1996*, by Thomas Snyder et al. (Washington, DC: Government Printing Office, November 1996), table 51, p. 65.

mentally retarded fell 16 percentage points between 1976–1977 and 1993–1994, from 26 percent to 10 percent, while the representation of children and youth identified as having serious emotional disturbance among all children and youth with disabilities remained virtually unchanged at 8 percent, from the 1970s to the mid–1990s.[18] (See table 3.3.)

State Comparison of Served Special Education Students

Percentages of all publicly educated students who are served in special education programs vary by State. In 1994–1995, the number of children between the ages of 6 and 17 receiving special education services funded under IDEA, Part B, as a proportion of all children in public schools ranged from below 8 percent in Hawaii, Arizona, and the District of Columbia to above 13 percent in Massachusetts, New Jersey, and Rhode Island.[19]

The distribution of children aged 6 to 21 served by IDEA, Part B programs, by disability varies from State to State. For instance, in 1994–1995, 61 percent of students with disabilities in California were identified as having a learning disability, compared to 32 percent in Georgia.[20] Approximately 23 percent of students with disabilities in Ohio (who were served in IDEA, Part B-funded programs), compared to 3 percent in New Jersey, were classified as having mental retardation.[21] With respect to serious emotional disturbance, 20 percent of students with disabilities in Minnesota had this disorder, compared to 0.5 percent in Mississippi.[22]

Racial/Ethnic Characteristics of Students Identified with Specified Disabilities

According to OCR's 1992 Civil Rights Survey, 4.5 million students (or 11 percent of the 42.3 million students in public elementary and secondary schools) were enrolled in federally sponsored special education programs.[23] The representation of various racial/ethnic groups among students with disabilities differs from their representation in the student population at large. Blacks were overrepresented among students identified as having disabilities, while Hispanics and Asian Americans were underrepresented.[24] (See table 3.5.) Of all students enrolled in public schools, 67 percent of students were white; 16 percent were black; 11 percent were Hispanic; 3 percent were Asian American; and 1 percent were Native American.[25]

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[18] DOEd, *Digest of Education Statistics 1996*, table 51, p. 65.

[19] DOEd, *1996 IDEA Report*, table AA13, p. A–40. Note that these figures are not directly comparable to the figures presented in tables 3.1—3.3, because they are based on the number of children with disabilities between the ages of 6 and 17 rather than all children with disabilities from birth to age 21.

[20] Ibid., table AA2, p. A–2. Note that the year 1994–1995 is the most recent year of State-level information on the number of students within various disability categories, who participated in programs funded by IDEA, Part B.

[21] Ibid., table AA2, p. A–2.

[22] Ibid., table AA2, p. A–2.

[23] DOEd, Office for Civil Rights (OCR), *National Summaries From the Elementary and Secondary Civil Rights Survey* (Washington, DC: 1992) (hereafter cited as OCR, *1992 National Summary*). The 1992 survey provided the most recent available data on gender and racial/ethnic profiles of students with disabilities.

[24] *See* OCR, *1992 National Summary*. An overrepresentation or underrepresentation of a particular racial/ethnic group among students with disabilities or in any disability category may result from a number of factors and does not necessarily result from discriminatory practices. However, where there is an overrepresentation or underrepresentation, further examination by OCR and the schools themselves is warranted to ensure that the statistical disparity is not caused by discriminatory practices.

[25] *See* OCR, *1992 National Summary*. Percentages may not add to 100 due to rounding and to students from other racial/ethnic groups not being included in this analysis.

The representation of various racial/ethnic groups varies with the category of disability:

- Blacks are overrepresented and whites are underrepresented among students who have mild retardation. In 1992, of students with mild retardation, blacks accounted for 32 percent of the population of students served, while whites constituted 61 percent (see table 3.5). Hispanics constituted about 5 percent of students identified with this particular disability in public education, considerably less than their representation in the general student population.[26] Asian Americans and Native Americans combined were 2 percent of students with mild retardation served in public programs (see table 3.5).
- Blacks were overrepresented among students with serious emotional disturbance. In 1992, blacks accounted for 24 percent of students with this disability (see table 3.5). Again, Hispanics, constituting 7 percent of students with SED, were underrepresented. Whites accounted for 67 percent of these students, while Asian Americans and Native Americans combined accounted for 2 percent of students with SED served in public education (see table 3.5).

- Of all students served in publicly supported programs who had specific learning disabilities, 68 percent were white, while 18 percent were black. Hispanics represented 12 percent of students identified as having learning disabilities. Asian Americans and Native Americans together constituted approximately 2 percent of elementary and secondary pupils with a learning disability (see table 3.5).

Gender Differences within Racial/Ethnic Groups of Youth Identified with Specific Disabilities

According to OCR's 1992 Civil Rights Survey, the representation of males and females among all students identified as having a disability varies among the three disabilities considered in this report. In 1992, as in previous years, males were overrepresented in certain specific disability categories. The male percentage among students with specific learning disabilities was 70 percent, and the male percentage among students with serious emotional disturbance was 80 percent, the highest proportion of males in any of the disability categories.[27] (See table 3.5.) A disproportion of males also was fairly pronounced among those classified as mentally retarded (60 percent male).[28] The 1992 Civil Rights Survey reported on gender composition only for specific disability categories and not for all disabilities as a group. Thus, it does not provide information on whether males were overrepresented among all students with disabilities. However, data from years before 1992 indicate that secondary school-age males were overrepresented among students with disabilities in general.[29]

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[26] OCR, *1992 National Summary*.

[27] *See* OCR, *1992 National Summary*. Although there is some evidence that reading disabilities are more common in males than females, there also is evidence from studies in other countries which does not show such disproportion. Some researchers explain males' overrepresentation in programs for students with serious emotional disturbance as being due to teachers and other school personnel being more likely to perceive boys rather than girls as troublesome and emotionally disturbed. *See* DOEd, *1992 IDEA Report*, p. 11; and DOEd, *1994 IDEA Report*, p. 113.

[28] DOEd, *1992 IDEA Report*, p. 11; and DOEd, *1994 IDEA Report*, p. 113. The percentage is based on males identified with mild retardation.

[29] DOEd, *1992 IDEA Report*, p. 11. Data from years before 1992 reveal that the representation of males among students with disabilities is higher than their representation in public school enrollment. For instance, in 1987, a demographic profile of secondary school-age youth (from ages 13 to 21 years old) with disabilities was constructed from a nationally representative sample of students. The data showed that the percentage of youth without disabilities who were male was slightly less than 50 percent; yet almost 70 percent of all secondary students with disabilities were male. Specifically, males accounted for 73 percent of students with learning disabilities and 76 percent of students with serious emotional disturbance (the highest proportion of males to females in any of the disability categories). The disproportion of males also was fairly pronounced among those classified as mentally retarded (58 percent male). *See* ibid.

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TABLE 3.4
Estimated Enrollment of Elementary and Secondary Students with Disabilities, by Selected Disability, Race/Ethnicity, and Gender: 1992

	Specific learning disabilities			Serious emotional disturbance			Mild retardation		
	Total	Males	Females	Total	Males	Females	Total	Males	Females
White	1,524,156	1,065,565	458,591	199,187	159,229	39,958	212,585	123,334	89,251
Black	398,859	277,772	121,087	70,087	55,983	14,104	112,052	68,029	44,022
Hispanic	262,344	177,465	84,879	20,407	16,406	4,001	18,513	10,655	7,858
Asian American	24,747	17,232	7,515	2,016	1,534	482	3,075	1,640	1,436
Native American	29,876	20,348	9,528	3,829	2,936	893	4,181	2,337	1,844
Total	2,239,982	1,558,382	681,600	295,526	236,088	59,438	350,406	205,995	144,411

Source U.S. Department of Education, Office for Civil Rights, *National Summaries from the Elementary and Secondary Civil Rights Survey* (Washington, DC, 1992).

TABLE 3.5
Elementary and Secondary Students with Disabilities, by Selected Disability, Race/Ethnicity, and Gender: 1992

(Percentage distribution of children served)

	Specific learning disabilities			Serious emotional disturbance			Mild retardation		
	Total	Males	Females	Total	Males	Females	Total	Males	Females
White	68.1	68.4	67.3	67.4	67.4	67.2	60.7	59.7	61.8
Black	17.8	17.8	17.7	23.7	23.7	23.7	32.0	33.0	30.6
Hispanic	11.7	11.4	12.5	6.9	7.0	6.8	5.3	5.3	5.4
Asian American	1.0	1.0	1.1	0.7	0.7	0.8	0.9	0.9	1.0
Native American	1.4	1.4	1.4	1.3	1.2	1.5	1.1	1.1	1.2
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Note: Percentages may not add to 100 due to rounding.
Source: U.S. Department of Education, Office for Civil Rights, *National Summaries from the Elementary and Secondary Civil Rights Survey* (Washington, DC, 1992).

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In all racial/ethnic groups, but especially in blacks, males account for significantly more than 50 percent[30] of their respective race/ethnicity's representation in a particular disability. For instance, with respect to specific learning disabilities, males accounted for 70 percent of the students within the white, black, and Asian American subpopulations. Male representation was only slightly less (about 68 percent) among the Native American and Hispanic populations.[31]

Among those identified as having a serious emotional disturbance, males represented 80 percent of students in the white, black, and Hispanic subpopulations. For Asian Americans and Native Americans, males accounted for approximately 76 percent of students with SED.[32] With respect to those classified as mentally retarded, males accounted for slightly more than 60 percent of black pupils; and well over 50 percent among the remaining subpopulations.

Educational Environments and Supplementary Services

Educational Environments for Students with Disabilities

The education received by children and youth with disabilities is shaped by many factors, including where instruction is received (e.g., regular or special classes), what support services they receive in the classroom, and what type of school they attend (regular or special).[33] Students with disabilities are educated as required by their Individual Education Programs (IEPs), generally in one of six environments, ranging from instruction in regular classes, special classes, special schools, home instruction, to instruction in hospitals and institutions.[34] The IDEA, Part B and its implementing regulations require that "to the maximum extent appropriate," children with disabilities, including those who are educated in public and private institutions and other care facilities, must be educated with children who are not disabled.[35] Education of children with disabilities in special education classes, separate schools, or other removal from the regular education environment can occur only when the nature and severity of the child's disability is such that education in regular classes with the use of supplementary services and aides cannot be achieved satisfactorily.[36]

Placement decisions for students with disabilities must be made on a case-by-case basis, in accordance with the child's IEP and the individual child's needs.[37] For students who are entitled to services under the IDEA, the appropriate learning environment(s), along with additional related services and curriculum needs, are determined by the students' IEPs. Students must be educated in the least restrictive environment in which the child's IEP can be implemented. The regulations stipulate that States must make "a continuum of alternative placements . . . available to meet the needs of children with disabilities."[38] For purposes of data collection and reporting only, six categories of settings have been delineated by the Department of Education. It must be noted that these six categories do not capture perfectly the full range of students' actual educational setting because, under IDEA, each child's educational program is tailored to meet that child's unique needs. In order of least to most restrictive, the categories are:

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[30] The 50 percent figure is based on males accounting for approximately 50 percent of their respective racial/ethnic group's total enrollment in public schools in 1992, as revealed by the 1992 OCR data. The data show males in public schools accounted for about 51 percent of Native Americans, 51 percent of Asians, 52 percent of Hispanics, 51 percent of blacks, and 52 percent of whites. *See* OCR, *1992 National Summary*.

[31] The 68 percent figure probably is not significantly different from 70 percent.

[32] The 76 percent figure probably is not significantly different from 80 percent.

[33] DOEd, *1995 IDEA Report*, p. 75.

[34] 34 C.F.R. § 300.551(b)(1) (1994).

[35] *See* Pub. L. No. 105–17, §§ 612(a)(5)(A), 632(4)(G) (1997); *see also* 34 C.F.R. § 300.550 (1996).

[36] *See* 34 C.F.R. § 300.550(b)(2) (1996).

[37] *See id.* § 300.552(a).

- *Regular class* consists of students who receive the majority (at least 80 percent) of their education program in a regular classroom and receive special education and related services outside the regular classroom.[39]

- *Resource room* consists of students who receive special education and related services outside the regular classroom for at least one-fifth but not more than 60 percent of the school day.[40]

- *Separate class* consists of students who receive special education and related services outside the regular classroom for at least 60 percent of the school day. Students may be placed in self-contained special classrooms with part-time instruction in regular classes or placed in self-contained classes full-time on a regular school campus.[41]

- *Separate school* consists of students who receive special education and related services in separate public or private day schools for students with disabilities, at the public's expense, for at least one-half the school day.[42]

- *Residential facility* consists of students who receive education in a public or private residential facility (at public expense) for at least one-half of the school day.[43]

- *Homebound/hospital environment* consists of students placed in and receiving special education in hospital or homebound programs.[44]

Special Education in the Context of the Regular Schools

In the 1993–1994 school year, approximately 98 percent of students attending public schools (42.7 million students) were enrolled in the Nation's 80,000 regular schools.[45] Many of these facilities do *not* restrict themselves to the provision of regular education classes, but often provide a range of special education programs in addition to their traditional curriculum offerings.[46] The types of education facilities available vary by State. For instance, North Dakota and New Hampshire served all of their public school pupils in regular schools, and therefore had no separate public school for students with disabilities or those in need of a nontraditional school setting.[47] In contrast, Delaware had the largest proportion of students in nonregular schools, which served almost 8 percent of the State's publicly educated students.[48]

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[38] *Id.* § 300.551(a).

[39] DOEd, *1996 IDEA Report*, p. 69.

[40] Ibid.

[41] DOEd, 1995 IDEA Report, p. 14; and DOEd, *1996 IDEA Report*, p. 69. *See* definition below of "regular schools," footnote 45.

[42] DOEd, *1996 IDEA Report*, p. 69. A special education school focuses primarily on special education, with materials and instructional approaches adapted to meet the students' needs. *See* DOEd, National Center for Education Statistics, *Overview of Public Elementary and Secondary Schools and Districts: School Year 1993–94*, by Lee Hoffman (Washington, DC: September 1995), p. 4. In 1993–1994, approximately 217,300 students with disabilities received educational and related services in the Nation's 1,600 public special education schools. Ibid., p. 1 and table 1. Illinois had 237 of such schools (6 percent of its total public schools) to enroll 1.2 percent of publicly educated students. Ibid., table 1. Two percent of California's and New York's public schools were special education schools (136 and 83 facilities, respectively). Ibid.

[43] DOEd, *1996 IDEA Report*, p. 69.

[44] Ibid.

[45] DOEd, National Center for Education Statistics, *Overview of Public Elementary and Secondary Schools and Districts: School Year 1993–1994*, by Lee Hoffman (Washington, DC: September 1995), p. 1 and table 1 (hereafter cited as DOEd, *Overview of Public Elementary and Secondary Schools and Districts*). Regular schools are defined as schools that do not focus primarily on special, vocational, or alternative education, although they may offer programs in addition to the standard curriculum. *See* DOEd, National Center for Education Statistics, *Instructions for Completing Nonfiscal Surveys of the Common Core of Data 1995–1996*; and DOEd, *Overview of Public Elementary and Secondary Schools and Districts*, p. 4. The schools offer a standard curriculum leading to a high school diploma. Regular schools can include magnet, charter, and multicultural

In the past, some members of the education community assumed a correlation between the intensity of the special education services provided and the restrictiveness of the educational environment.[49] It was assumed that students in separate classes generally received a greater number of hours of special education per day or week, for instance, and had a smaller pupil-teacher ratio than did their peers in regular classes or resource rooms.[50] However, since efforts to serve students in regular classroom and resource room settings have increased in recent years, and many local school districts are providing intensive special education services within regular classroom settings, this assumption may no longer be valid.[51]

Educational Environments of Students with Disabilities: 1989–1990 to 1993–1994

The U.S. Department of Education's Office for Special Education and Rehabilitative Services (OSERS) collects data annually from States on

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schools. *See* Lee Hoffman, Statistician, U.S. Department of Education, National Center for Education Statistics, telephone interview, June 19, 1997 (hereafter cited as Hoffman interview). Although regular elementary or secondary schools do not focus/concentrate primarily on special education (or vocational, alternative, or other specialized areas), they can provide programs in these areas, and educate students with disabilities, as well as offer self-contained programs to meet their needs (as stipulated in their IEPs). *See* Hoffman interview.

[46] DOEd, *Overview of Public Elementary and Secondary Schools and Districts*, p. 1.

[47] Ibid., table 1. The most recent available data on individual States' specialty schools is from the 1993–1994 school year. In States such as New Hampshire and North Dakota, all students with disabilities who attended public schools were enrolled in public regular schools. *See* ibid., table 1. Many of the Nation's public regular schools offer special education programs (in addition to traditional programs) to meet the needs of students with IEPs. *See* ibid., p. 1; and Hoffman interview. However, not all students with disabilities in these States were enrolled in public schools. For instance, in 1993–1994, with respect to 6- to 11-year-old students with mental retardation (served in programs funded by IDEA, Part B and/or Title I) in the States of New Hampshire and North Dakota, 1 percent and 0.5 percent of these children, respectively, were served in private separate facilities. *See* DOEd, *1996 IDEA Report*, table AB–4, p. A–81. Similarly, in 1993–1994, New Hampshire educated more than 6 percent of 12- to 17-year old youth with serious emotional disturbance (who participated in programs funded by IDEA, Part B and/or Title 1) in private facilities. *See* ibid., table AB–5, p. A-109. Note that the year 1993–1994 is the most recent year of State-level data on the number of students with disabilities who were educated in various environments.

[48] DOEd, *Overview of Public Elementary and Secondary Schools and Districts*, table 1. Nonregular schools can include special education schools, alternative schools, and vocational schools. *See* ibid., p. 4. Special education schools function predominately to educate students with disabilities; and materials and instructional approaches are adapted to meet these students' needs. *See* ibid., p. 4. The emphasis of these public elementary and secondary schools is to educate students with IEPs. *See* Hoffman interview. Vocational education schools focus primarily on vocational education and provide training in at least one semi-skilled or technical occupation. *See* DOEd, *Overview of Public Elementary and Secondary Schools and Districts*, p. 4. Alternative education schools, address the needs of potentially at-risk students (e.g., inconsistent school attendance, high probability of academic failure) that cannot be met in a regular school setting with a regular curriculum. These schools provide a "non-traditional" education. *See* ibid., p. 4; and Hoffman interview.

[49] DOEd, *1994 IDEA Report*, p. 15.

[50] Ibid.

[51] Ibid.

the educational environments of students receiving special education services. These data reveal that approximately 95 percent students with disabilities are educated in regular classes, resource rooms, or separate classes within a regular school.[52] In the 1993–1994 school year, 43 percent of all children and youth with disabilities between the ages of 6 and 21 were served in regular classes, up from 32 percent in 1989–1990 (see table 3.6). About 30 percent of students with disabilities were educated in the resource room setting, down from 38 percent in 1989–1990. Approximately 23 percent of students with disabilities were served in a separate class in a regular school building, which was virtually the same as 3 years earlier (see table 3.6).

Enrollment in separate schools, residential facilities, and hospital/homebound remained relatively stable between 1988–1989 and 1993–1994. In 1993–1994 fewer than 5 percent of students between the ages of 6 and 21 with disabilities were served outside of regular school buildings.[53] Of the approximate 4.5 percent in separate facilities, 3.1 percent were served in separate day schools; 0.7 percent were in residential facilities; and the remaining 0.6 percent were homebound or served in hospitals (see table 3.6).

Educational Placement Patterns of Students with Specific Disabilities: 1989–1990 to 1993–1994

The educational environments of students with disabilities vary considerably, and the variations are related to the nature of the students' disabilities.[54] As a rule, students with disabilities who tend to require more specialized educational programming are served in more restrictive placements, such as separate classes.[55] Students with mild learning disabilities are served more often in regular classes and resource rooms.[56] Data from the late 1980s and early 1990s obtained by the National Longitudinal Transition Study of Special Education Students (NLTS) suggest that students with less significant disabilities spend more time in regular education.[57]

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[52] *See* definition above of "regular school," footnote 45, p. 58.

[53] Ibid.

[54] DOEd, *1994 IDEA Report*, p. 13.

[55] Ibid.

[56] Ibid.

[57] DOEd, *1995 IDEA Report*, p. xxiii. The 5-year study followed a representative sample of more than 8,000 secondary school age youth with disabilities who represented 11 different Federal disability categories. *See* DOEd, *Digest of Education Statistics 1996*, p. 479; DOEd, *1996 IDEA Report*, pp. 65 and 84; and DOEd, *1992 IDEA Report*, p. 80. For additional information on the study methodology and sampling procedures, *see* DOEd, *Digest of Education Statistics 1996*, p. 479; DOEd, *1996 IDEA Report*, pp. 65 and 84; and DOEd, *1992 IDEA Report*, p. 80. OSERS contracted with SRI International to determine a study design, develop and field test data collection instruments, and select a sample of students for the study that would meet the congressional mandate. *See* DOEd, *1992 IDEA Report*, p. 80.
Data were collected to address concerns of the education community such as (a) the types of programs that students with disabilities in secondary education experience; (b) contributions of academic, vocational, and other programs that affect students' in-school performance (such as teacher/student ratios, access to and utilization of computers); as well as (c) program characteristics that enable these students to progress into postsecondary education. *See* DOEd, *1992 IDEA Report*, pp. 79–108; and DOEd, *1994 IDEA Report*, pp. 73–104; and DOEd, *1995 IDEA Report*, pp. 73–88.
The NLTS collected data on students' demographic factors (such as race/ethnicity, gender, family income, and household characteristics such as family size). *See* DOEd, *1992 IDEA Report*, pp. 95–98; and DOEd, *1994 IDEA Report*, pp. 87–104.
The NLTS permitted studies of the statistical relationship between a student's gender, ethnic background, socioeconomic status, and other characteristics on school performance (e.g., absenteeism, number of courses failed), dropout rates, and other education variables. *See* DOEd, *1992 IDEA Report*, pp. 95–98; and DOEd, *1994 IDEA Report*, pp. 87–104.

TABLE 3.6
Percentage of Students with Disabilities Aged 6-21 Served in Different Educational Environments by Disability: School Years 1989-1990 to 1993-1994

	Educational environment					
	Regular class	Resource room	Separate class	Separate school	Residential facility	Hospital/ homebound
1989-1990						
All disabilities	31.5	37.6	24.9	4.6	0.9	0.6
L.D.	20.7	56.1	21.7	1.3	0.1	0.1
M.R.	6.7	20.1	61.1	10.3	1.4	0.4
S.E.D.	14.9	28.5	37.1	13.9	3.6	2.0
1990-1991						
All disabilities	34.0	34.5	25.2	4.9	0.8	0.6
L.D.	22.6	53.5	22.4	1.0	0.2	0.2
M.R.	7.6	22.6	58.5	9.9	1.1	0.4
S.E.D.	16.8	29.1	35.7	13.4	3.5	1.4
1991-1992						
All disabilities	34.9	36.3	23.5	3.9	0.9	0.5
L.D.	24.7	54.2	20.0	0.9	0.1	0.1
M.R.	5.1	25.4	59.2	8.8	1.2	0.3
S.E.D.	15.8	27.8	36.9	13.9	4.0	1.5
1992-1993						
All disabilities	39.8	31.7	23.5	3.7	0.8	0.5
L.D.	34.8	43.9	20.1	0.8	0.2	0.2
M.R.	7.1	26.8	56.8	7.9	0.9	0.5
S.E.D.	19.6	26.7	35.2	13.7	3.5	1.3
1993-1994						
All disabilities	43.4	29.5	22.7	3.1	0.7	0.6
L.D.	39.3	41.0	18.8	0.6	0.1	0.1
M.R.	8.6	26.1	57.0	7.0	0.7	0.5
S.E.D.	20.5	25.8	35.3	13.4	3.2	1.8

Disability abbreviations:
L.D. = Specific Learning Disabilities
M.R. = Mental Retardation
S.E.D. = Serious Emotional Disturbance

Sources: For 1989-1990: U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities: Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, DC, 1992), p. 25. For 1990-1991: U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics 1994*, by Thomas Snyder et al. (Washington, DC: Government Printing Office, October 1994), p. 66. For 1991-1992: U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities: Sixteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, DC, 1994), p. 14. For 1992-1993: U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities: Seventeenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, DC, 1995), p. 17. For 1993-1994: U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities: Eighteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, DC, 1996), p. 71.

In the years from the 1989–1990 school year to the 1993–1994 school year, a greater proportion of students aged 6 to 21 with learning disabilities were served in regular classes than were their peers with serious emotional disturbance or those classified as mentally retarded. The resource room was the most common educational setting for students with learning disabilities during this 5-year period (see table 3.6). However, during each successive school year in the 1990s, fewer students with learning disabilities were placed in the resource room; and a greater percentage were educated in the less restrictive regular class. For instance, in 1993–1994, 41 percent of students with learning disabilities were placed in the resource room, down from 56 percent in 1989–1990 (see table 3.6). In addition, 39 percent were educated within the regular class in 1993–1994, up from 21 percent in 1989–1990 (table 3.6). As a result, students with learning disabilities are becoming even more integrated in a regular learning environment. According to DOEd, many students with learning disabilities are educated for at least a portion of their school day with their nondisabled peers; however, they are "pulled out" for "extended resource room support or alternative academic courses."[58]

As a group, students aged 6 to 21 with serious emotional disturbance (SED) are less integrated into regular classroom settings. Separate facilities from the regular school were more common educational environments for students with serious emotional disturbance than for their peers with learning disabilities and students classified as mentally retarded (see table 3.6).[59] Between 1989–1990 and 1993–1994 about one-fifth of students identified as having serious emotional disturbance received their education in separate schools and facilities. For students with SED, however, separate classes within a regular school were the most common education environment (serving 35 to 37 percent of students with SED between 1988–1989 and 1993–1994) during the 5-year period (see table 3.6). Moreover, although students with SED were more likely than their peers classified as mentally retarded to be served in separate facilities (the most restrictive settings), they also were more likely to be educated in the regular classroom (the least restrictive educational setting). In 1993–1994, for instance, 21 percent of students with SED, compared to 9 percent of their peers classified as mentally retarded, were placed in a regular class (table 3.6). According to the Department of Education, perceptions of school personnel that the behavior problems of students with SED are difficult to accommodate in regular classes could impede increased integration.[60]

Similar to students with SED, students aged 6 to 21 classified as mentally retarded are educated primarily in separate classes, with resource rooms as the second most common setting (see table 3.6). However, some movement during the 4-year period towards less restrictive environments was reflected in fewer enrollments in separate classes of students classified as mentally retarded in 1993–1994 (57 percent) than in 1989–1990 (61 percent), and more placements in the resource room in 1993–1994 (26 percent) compared to 1989–1990 (20 percent). Also during the 4-year period, about 10 percent of students classified as mentally retarded received their education on premises separate from the regular school building.[61] (See table 3.6.)

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[58] DOEd, *1996 IDEA Report*, p. 68.

[59] *See* definition above of "regular school," footnote 45, p. 58.

[60] DOEd, *1992 IDEA Report*, p. 28.

[61] *See* definition above of "regular school," footnote 45, p. 58.

Educational and Support Services for Secondary School Students with Disabilities

Starting in 1987, OSERS began funding a longitudinal study of a representative sample of students receiving special education services who were between the ages of 13 and 21 in 1987. The study, entitled the National Longitudinal Transition Study of Special Education Students (NLTS), was mandated by Congress to provide information on the transition of students with disabilities from secondary school to adulthood.[62] The NLTS data reveal that more than 60 percent of secondary school students with disabilities, on average, were enrolled in some form of vocational education during their most recent school year, and special education students received an average of 5 hours per week of instruction in this area.[63] Of those enrolled in vocational courses, approximately one-half completed occupationally oriented courses, while the other half had either home economics-oriented courses, work exploration, or on-the-job training.[64]

In addition, secondary school-aged students with disabilities received a variety of related services in order to meet the educational needs stemming from a disability.[65] More than 50 percent of all secondary students with disabilities received job training during their most recent school year; more than 25 percent received occupational therapy/life skills training; and about 16 percent received personal counseling/therapy.[66]

Personnel Employed to Serve Students with Disabilities

According to the Department of Education, to ensure that all students with disabilities have access to a free appropriate education, there must be an adequate supply of personnel with appropriate training or certification including teachers, diagnostic staff, related services personnel, and other instructional and noninstructional staff.[67] In the 1993–1994 school year, 331,392 special education teachers were fully or at least partially certified to potentially educate the 4.79 million students with disabilities between the ages of 6 and 21, who participated in federally funded programs in that academic year.[68]

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[62] DOEd, *1995 IDEA Report*, p. 156.

[63] Ibid., p. 159.

[64] Ibid.

[65] Ibid., p. 157.

[66] Ibid., pp. 157–158; and DOEd, *1996 IDEA Report*, pp. 95–96.

[67] DOEd, *1995 IDEA Report*, p. 28.

[68] DOEd, *1996 IDEA Report*, table AC2, p. A–153; and DOEd *1995 IDEA Report*, table AA1, p. A–1. Teachers who have full certification have attained the appropriate State certification or licensure for their particular position held. *See* DOEd, *1996 IDEA Report*, p. 21. Teachers who were not fully certified were employed on an emergency, provisional, or other basis, and had not received the appropriate State certification or licensure for the position to which they were assigned. *See* ibid., p. 21. These teachers included those who were in the process of attaining certification, and needed to teach a specific number of hours in their specialized area prior to earning their certificate. *See* ibid.

Note that teachers who are considered "special education teachers" do not comprise the only teachers instructing 6- to 21-year-old students with disabilities (such as those served by federally supported programs). Some of these youngsters, such as those who receive instruction at least for part of their academic day in regular classes, are instructed by regular education teachers. Also note that students with disabilities who participate in federally supported programs do not comprise the total number of 6- to 21-year-old students with disabilities enrolled in special education programs in the Nation's schools. Therefore, special education teachers can also potentially instruct other 6- to 21-year-old students with disabilities who are enrolled in the Nation's schools, and participating in programs other than those funded by IDEA, Part B and Title 1.

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Between 1989–1990 and 1993–1994, the largest special education teacher category was the learning disabilities category, which employed more than 30 percent of all full-time special education teachers during the first four years, and 28 percent during 1993–1994.[69] This proportion is consistent with the fact that about one-half of all students with disabilities are identified as having learning disabilities. During the same period, about 25 percent of special education teachers employed by the Nation's public schools were at least partially certified to instruct 6- to 21-year old students in cross-categorical classes, where children and youth with a variety of disabilities are served.[70] Also in 1993–1994, the Nation employed nearly 30,000 and 42,000 special education teachers to teach 6- to 21-year-old students with serious emotional disturbance and those classified as mentally retarded.[71]

Based on the NLTS data, regular academic classes in secondary schools averaged one teacher and 23 students, two or three of whom had disabilities.[72] Approximately 7 percent of the teachers in secondary schools reported that they had aides in their classrooms to assist students with disabilities.[73] Special education classes in secondary schools averaged one teacher and a part-time aide to instruct nine students.[74] Fewer than 50 percent of students with disabilities in regular academic classes had their progress monitored by a special education teacher; but tutoring from a special education teacher was provided to more than 33 percent of students with disabilities who were educated in regular classes.[75] Most regular education teachers received support for educating students with disabilities; the support tended to be in the form of consultation from the school's special education staff.[76]

Students with Disabilities Exiting Educational Programs

Basis of Exiting the Educational System for Students with Disabilities: 1989–1990 to 1991–1992

OSERS requires States to report on the "basis" for exiting of students leaving special education.[77] The possible bases include: graduation with a diploma, graduation with a certificate of completion/modified diploma, dropping out of school, reaching maximum legal age for which special education services are available (and students can thereby no longer accumulate necessary credits for graduation), and status unknown.[78] During the 1991–1992 school year, approximately 229,368 students with disabilities exited the educational system.[79] Approximately 44 percent of students with disabilities who exited the special education system received a standard diploma, while 14 percent received a certificate of completion/modified diploma (see table 3.7). Almost 2 percent exited because they had reached the maximum age for services[80] and consequently exited the educational system prior to completing graduation requirements. Approximately 22 percent exited by dropping out of school before graduating. The remaining 18 percent exited with status unknown (see table 3.7).

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[69] DOEd, *1992 IDEA Report*, pp. 39–40; DOEd, *1994 IDEA Report*, pp. 21–22; DOEd, *1995 IDEA Report*, p. 29; and DOEd, *1996 IDEA Report*, table 1.9, p. 24.

[70] Ibid.

[71] DOEd, *1996 IDEA Report*, table 1.9, p. 24.

[72] DOEd, *1995 IDEA Report*, p. 75.

[73] Ibid.

[74] Ibid.

[75] Ibid.

[76] Ibid.

[77] The years 1989–1990 and 1991–1992 were selected based on available data. Beginning with the 1992–1993 data, instead of calculating and reporting the *percentage of exiters by exit category (e.g., graduate with diploma, dropout)*, DOEd began calculating and reporting the *percentage of all students with disabilities age 14 or older* who are exiting in each category in a given year. As a result, complete comparable data on exiting patterns among students with disabilities are available for 1989–1990 to 1991–1992, but not for 1992–1993 or 1993–1994. *See* DOEd, *1996 IDEA Report*, p. 10 and DOEd, *1994 IDEA Report*, p. 17.

Between 1989–1990 and 1991–1992, the rate at which students with disabilities exited by dropping out decreased from 27 percent[81] to 22 percent.[82] The total high school graduation rate (reflecting recipients of diplomas and certificates combined) in 1991–1992 (58 percent of exiters) hardly changed from 2 years earlier (57 percent).[83] The proportions of graduates who received high school diplomas relative to the proportion receiving certificates of completion were similar in the 2 years (see table 3.7).

Exiting Patterns Among Students with Specific Disabilities: 1989–1990 to 1991–1992

The percentage of students exiting through each basis varies considerably from one disability group to another. However, graduation with a diploma was the most common basis of exit for all disability groups except students with SED (see table 3.7). In 1989–1990, youth with specific learning disabilities were slightly more likely to graduate than students with all disabilities combined, at 62 percent.[84] In 1991–1992, approximately 61 percent of students with learning disabilities graduated (50 percent with a diploma and 11 percent with a certificate), while 21 percent dropped out. In all 3 years, fewer than 1 percent of exiting students with learning disabilities exited because they reached the maximum

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[78] "Status unknown" includes students who transferred to other school districts but were not known to be continuing their education; students who did not formally withdraw from school but simply stopped attending school; students who may have returned to or were enrolled in regular education; students who may have moved without requesting transcripts; and students who died. *See* DOEd, *1992 IDEA Report*, p. 32. Therefore, it is not always the case that the "status unknown" exit category is composed solely of high school dropouts. *See* DOEd, *1994 IDEA Report*, p. 17.

Since 1992–1993, OSERS has added four specific categories to classify students exiting educational programs. These additional special education exit categories have replaced the "exited with status unknown" basis, and include, "returned to regular education," "died," "moved, known to be continuing," and "moved, not known to be continuing." *See* DOEd, *1996 IDEA Report*, p. 10 and DOEd, *1994 IDEA Report*, p. 17. The new format was optional in the 1992–1993 school year, but required in 1993–1994. *See* DOEd, *1996 IDEA Report*, p. 10 and DOEd, *1994 IDEA Report*, p. 17. OSERS' requiring additional, more precise categories compels State education agencies to improve their accuracy in collecting data to track students, which can potentially (a) reduce the percentage of students who depart from special education programs prior to a State education agency's obtaining clarification of their status; and (b) help eliminate the erroneous assumption that students in the former "status unknown" exit category dropped out of school prior to completion.

The year 1993–1994 was the first year for which all States reported data on students exiting special education using the revised OSERS data categories. *See* DOEd, *1996 IDEA Report*, p. 10. Note: The exit categories "graduated with diploma," "graduated with certificate," "reached maximum age for services," and "dropped out" were retained. Ibid., pp. 10–16.

[79] DOEd, *1994 IDEA Report*, p. 15.

[80] Upper age limits for service vary by State. *See* DOEd, *Digest of Education Statistics 1996*, p. 112.

[81] DOED, *1992 IDEA Report*, p. 33.

[82] DOEd, *1994 IDEA Report*, p. 16.

[83] DOEd, *1992 IDEA Report*, p. 34; and DOEd, *1994 IDEA Report*, p. 19.

[84] DOEd, *1992 IDEA Report*, p. 34. *See* table 3.7.

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TABLE 3.7
Basis of Exit for Students with Different Disabilities, by Percentage of Exiters in Various Disability Categories: School Years 1989-1990 to 1991-1992

	Diploma	Certificate	Dropout	Maximum age	Status unknown
1989-1990					
All disabilities	44.8	12.4	27.0	2.5	13.3
L.D.	51.9	10.0	26.8	0.5	10.9
M.R.	37.5	24.4	23.6	6.7	7.8
S.E.D.	30.7	6.1	43.2	2.2	17.8
1990-1991					
All disabilities	45.7	13.3	23.3	2.0	15.8
L.D.	51.7	10.8	22.2	0.7	14.7
M.R.	38.7	24.6	21.6	5.2	9.9
S.E.D.	30.8	7.9	37.2	1.3	22.9
1991-1992					
All disabilities	43.9	13.5	22.4	1.9	18.3
L.D.	49.7	10.8	21.3	0.5	17.7
M.R.	36.1	27.7	19.6	6.0	10.5
S.E.D.	28.1	6.5	35.0	1.0	29.4

Disability abbreviations:
L.D. = Specific Learning Disabilities
M.R. = Mental Retardation
S.E.D. = Serious Emotional Disturbance

Sources: For 1989-1990: U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities: Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, DC, 1992), p. 34. For 1990-1991: U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics 1994*, by Thomas Snyder et al. (Washington, DC: Government Printing Office, October 1994), p. 112; and for 1991-1992: U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities: Sixteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, DC, 1994), p. 19.

age to receive special education services (see table 3.7).

In 1991–1992, the youths classified as mentally retarded exited their K–12 schooling by graduating with a diploma or certificate at a rate slightly higher than that of their peers with learning disabilities (table 3.7). Much larger proportions of students with mental retardation graduated through the certificate method (e.g., 28 percent in 1991–1992) than did their counterparts with learning disabilities (e.g., 11 percent in 1991–1992). (See table 3.7.) However, students classified as mentally retarded were less likely (e.g., 36 percent in 1991–1992) than students with learning disabilities (e.g., 50 percent in 1991–1992) to graduate via a high school diploma.[85] In each of the examined years, the high school dropout rate among students classified as mentally retarded (e.g., 20 percent in 1991–1992) was below the average for all students with disabilities (e.g., 22 percent in 1991–1992).[86] (See table 3.7.) Furthermore, students with mental retardation were much more likely than all disabilities combined to exit because of reaching maximum age for service delivery.[87]

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[85] DOEd, *1994 IDEA Report*, p. 19.

[86] Ibid.

The exiting patterns of students with serious emotional disturbance were considered the most troubling to the Department of Education.[88] In 1991–1992, only 35 percent of exiting students with serious emotional disturbance graduated (28 percent with a diploma, 7 percent with a certificate), compared to 57 percent of students with all disabilities. Students with serious emotional disturbance also had a 35 percent dropout rate (the highest among any group of students with disabilities), which was more than 1.5 times the 22 percent average for all students with disabilities.[89] Most students with serious emotional disturbance who drop out tend to do so by 10th grade.[90]

High School Dropouts

Similar to the decision to drop out by students who do not have disabilities, for students with disabilities, dropping out of school usually is the culmination of a cluster of school performance problems, including high absenteeism and poor grade performance.[91] According to the findings from the NLTS study, if students with disabilities progress to high school, they tend to stay until they are the same age as typical students who graduated.[92] The study found that the average age at which high school students with disabilities dropped out was 18; and the average age for graduation was 19.[93] However, approximately 8 percent of students with disabilities dropped out of school prior to enrolling in ninth grade.[94] Of students with learning disabilities, 4.4 percent dropped out in ninth grade, compared to 7.3 percent and 8.6 percent of their peers classified as mentally retarded and seriously emotionally disturbed, respectively.[95]

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[87] *See* table 3.7.

[88] DOEd, *1992 IDEA Report*, p. 35.

[89] DOEd, *1994 IDEA Report*, p. 19. The remaining students with serious emotional disturbance exited special education because they reached the maximum age for service (1.0 percent) or because they were of "status unknown" (29 percent). Ibid.

[90] Ibid., p. 109.

[91] The NLTS data revealed that on the average, 11 percent of students with disabilities do not receive grades in any courses during secondary school. Receiving grades is strongly related to the nature and severity of students' disabilities. For instance, only 5 percent of students with learning disabilities did not receive any grades; whereas 25 percent of those classified as mentally retarded did not receive any grades. Approximately, 54 percent of students with disabilities who attended separate schools did not receive any grades in courses. In addition, the almost 66 percent of special education students who were not assigned to specific grade levels also did not receive any specific course grades. *See* DOEd, *1992 IDEA Report*, p. 89.
The Department of Education acknowledges that when examining course grades (as measures of student performance) among the special education student population, students with the most severe disabilities and lowest functional skills are eliminated from the analyses. These students tend to exit secondary school by reaching maximum age, as opposed to deciding to drop out. Therefore, the dropout rate among the special education community is higher among those students who are considered "higher mental functioning" and are assigned course grades for their academic performance. Ibid., pp. 81 and 89.

[92] DOEd, *1994 IDEA Report*, p. 98.

[93] Ibid., p. 98.

[94] Ibid., p. 97.

[95] Ibid., p. 99.

Relationship of Ingrade Retention to Dropout Status

Based on sample data collected by the Bureau of the Census through the Current Population Survey,[96] youth and young adults between the ages of 16 and 24 with disabilities are more likely to have repeated one or more grades than those without a disability.[97] In 1992, although fewer than 12 percent of all students had been retained in grade at least once,[98] 32 percent of students with any disability had repeated at least one grade; and more than one-half (52 percent) of students with a learning disability had at least one grade retention.[99] However, among those who had been retained, students with disabilities had dropout rates similar to those with no disability.[100] Almost 20 percent of all students who experienced at least one grade retention dropped out of school. The rates for students with any disability or specifically a learning disorder were 21 and 17 percent, respectively.[101]

Outcomes of High School Completers Relative to Dropouts

Students with disabilities who graduate from high school have distinct advantages as they enter the postschool phases of their lives compared to their peers who dropped out. For instance, based on NLTS data, during the first 2 years after exiting, graduates were 17 percentage points more likely to have obtained competitive employment than were dropouts with similar disability status, and similar individual, household, and community characteristics.[102] Similarly, students with disabilities who graduated from high school were estimated to be 14 percentage points more likely than dropouts to have enrolled in postsecondary school; and they were 27 percentage points more likely to have become engaged in work- or education-related activities outside the home after high school.[103]

NLTS data suggest that if schools can give students with disabilities reasons to come to school and help students achieve in their courses, they can help many students persist in school.[104] If educators are able to help students perform up to their ability and to school expectations, they can reduce the likelihood of students with disabilities withdrawing from school prior to completion, and will have improved their students' prospects for success in their adult years.[105] According to the Department of Education, schools need to determine continually what the education community (and supporting services) can do to assist students with disabilities in making a transition from school to an independent adulthood status more effectively.[106] However, there seems to be no single answer in terms of "what works" because of the significant and growing diversity of students attending the Nation's public schools.[107]

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[96] The information provided in this section is not intended to establish a link between (a) disabled students' academic achievement or attainment (e.g., experience in-grade retention and/or withdrawal from school prior to completion); and (b) special education programs, such as those funded by IDEA, Part B, in which they participate in school.

[97] DOEd, National Center for Education Statistics, *The Condition of Education 1994*, by Thomas Smith et al. (Washington, DC: Government Printing Office, August 1994), p. 30.

[98] Ibid.

[99] Ibid.

[100] Ibid.

[101] Ibid. *See* table 4-1, p. 176.

[102] DOEd, *1992 IDEA Report*, p. 108.

[103] Ibid.

[104] Ibid.

[105] Ibid.

Early Postschool Results of Youth with Disabilities

Students with less significant disabilities (i.e. those who have a higher functioning level) tend to spend more of their time as secondary students in the regular classroom, as shown throughout this section on special education, and have postsecondary outcomes more similar to their nondisabled peers than to their peers with more severe disabilities.[108]

Participation in Postsecondary Education as a Function of Instruction Time in Less Restrictive Classroom Environments

According to NLTS data, among students with disabilities who participated in postsecondary academic programs, 70 percent had the skills and relatively high functioning capacity to spend at least 75 percent of their time in high school regular education.[109] Slightly fewer than 23 percent of youth with disabilities in academic postsecondary education had spent between 26 and 74 percent of their school time in regular classroom.[110] Furthermore, only 7 percent of those who went on to postsecondary academics spent less than 25 percent of their high school education time in regular education classrooms.[111] The data from NLTS also show that the increased time in regular education enhances students' overall intellectual and social competence by providing better preparation for postsecondary experiences.[112]

Participation in Postsecondary Education as a Function of Type/Severity of Disability

Youth with disabilities continue to be less likely than their peers in the general population to participate in postsecondary education.[113] However, according to the American Council on Education, the percentage of all freshmen entering college who reported disabilities quadrupled between 1978 and 1991 (from 2.2 percent to 8.8 percent of all freshmen).[114] The Department of Education's NLTS data suggest that, among youth with disabilities, 16.5 percent enrolled in academic postsecondary programs, while 14.7 percent enrolled in vocational postsecondary programs within 3 years after graduating from high school.[115]

The NLTS data further reveal that youth in some disability categories pursued postsecondary academic education in greater numbers than others, especially since the disability categories cover a wide range of skill and functioning level among students.[116] For instance, 19 percent of students with specific learning disabilities were enrolled in an academic program in a postsecondary institution at some point within 3 years after leaving secondary school, compared to 15 percent of their peers with serious emotional disturbance, and fewer than 3 percent of their peers classified as mentally retarded.[117]

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[106] DOEd, *1995 IDEA Report*, p. 74.

[107] DOEd, *1992 IDEA Report*, p. 102.

[108] Ibid., pp. xxiii-xxv.

[109] Ibid., p. xxiv.

[110] Ibid., p. 79.

[111] Ibid.

[112] Ibid., p. xxiii.

[113] Ibid., p. 77.

[114] Ibid., p. xxiv.

[115] Ibid., p. xxiv.

OCR Complaints and Compliance Reviews Based on Disability

This section provides a descriptive summary of data obtained from OCR's Case Information System (CIS) data base, which includes information on complaints and compliance reviews handled by OCR for fiscal years 1993 through 1995.[118]

A review of the jurisdiction and bases of complaints received by OCR from fiscal year 1993 to fiscal year 1995 indicates that 55 percent of all issues raised in complaints received during the period were based on disability. Of the disability complaints received by OCR during the period, the majority were related to physical and health disabilities, such as orthopedic impairments, hearing and visual impairments, and cancer, epilepsy, and other health impairments. Approximately one-quarter of the complaints related to the disabilities addressed in this report (specific learning disability, mental retardation, serious emotional disturbance, and behavioral disorders).[119] (See table 3.8.)

A review of the jurisdiction and bases of compliance reviews initiated by OCR during the same period indicates that compliance reviews related to disability comprised a low percentage of all compliance reviews. For fiscal years 1993 through 1995, 16 (less than 5 percent) of compliance reviews cited disability as a basis. Of these, one related to learning disability and the others did not relate to the disabilities considered in this report. (See table 3.9.)

The remainder of the discussion in this section relates only to complaints and compliance reviews raising issues pertaining to the assignment of students with physical and mental impairments.[120] These issues include location/notification; evaluation/classification; placement/referral; educational setting; and IEP services.[121] Therefore, the discussion does not address disability-related complaints that pertain to other issues, such as program service (e.g., program accessibility, or related aids and services), program requirements (e.g., academic adjustments), support services (e.g., counseling and tutoring),

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[116] Ibid., p. 77.

[117] Ibid., p. 78.

[118] The numbers within the tables that appear below reflect "selected subcategories" and therefore may not add up. For example, only those Title II jurisdictions related to the report are placed within the tables. In addition, the reason for so few findings of violation on the issue of assignment of students with mental impairments, learning disabilities, and mental retardation is not that there are few instances of noncompliance, but that OCR negotiates compliance agreements with school districts that are in noncompliance and only formally finds noncompliance when a district refuses to comply.

[119] The OCR database does not break out complaints received on the basis of serious emotional disturbance or behavioral disorder. The percentages cited above include in the numerator all complaints based on learning disability, mental retardation, attention deficit disorder, and attention deficit hyperactivity disorder. In addition some complaints based on speech impairment may be based on an impairment related to a learning disability.

[120] It should be noted that complaints and compliance reviews can raise multiple issues, and OCR's data base maintains separate data on each issue raised in a complaint.

[121] The issues of length of school day and length of school year were excluded from our data. *See* table 3.10. S–2–406 and S–2–407 were not included.

TABLE 3.8
Jurisdiction/Basis of Complaints Received by OCR: Fiscal Years 1993-1995

Jurisdiction/basis	**1993**	**1994**	**1995**	**1993-1995**
Title VI (race/national origin)	456	1,177	1,014	2,647
Title IX (sex)	267	436	371	1,074
Title II, section 504 (handicap)	1,568	2,760	2,734	7,062
Learning disabled	241	542	560	1,343
Mental retardation	48	89	110	247
Attention deficit disorder	1	10	31	42
Attention deficit hyperactivity disorder	1	3	30	34
Mental illness	121	342	287	750
Speech impairment	12	27	30	69
Orthopedic impairment	119	210	226	555
All hearing/visual impairments (including blind and deaf)	388	207	166	761
Cancer, epilepsy, and other health impairments	71	163	176	410
Alcohol/drug/chemical dependence	6	13	11	30
AIDS/HIV positive	0	0	2	2
Other handicapped basis	560	1,154	1105	2,819
Age	32	76	64	172
Multiple and other	336	824	798	1,958
Total	2,659	5,273	4,981	12,913

Source: U.S. Department of Education, Office for Civil Rights, Case Information System Database.

TABLE 3.9
Jurisdiction/Basis of Compliance Reviews Initiated by OCR: Fiscal Years 1993-1995

Jurisdiction/basis	**1993**	**1994**	**1995**	**1993-1995**
Title VI (race/national origin)	41	101	82	224
Title IX (sex)	30	28	6	64
Title II, section 504 (handicap)	9	7	0	16
Learning disabled	1	0	0	1
Mental retardation	0	0	0	0
Attention deficit disorder	0	0	0	0
Other handicapped basis	8	7	0	15
Age	2	0	0	2
Other	9	22	11	42
Total	9	158	99	348

Source: U.S. Department of Education, Office for Civil Rights, Case Information System Database.

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TABLE 3.10

Assignment of Students with Physical and Mental Impairments:* Jurisdiction/Basis of These Issues Designated in Complaint and Compliance Review Activities by Fiscal Year

***These issues designated** in complaints received*		**Number**	
Jurisdiction and basis	**1993**	**1994**	**1995**
Title VI (race/national origin)	19	41	34
Title IX (sex)	1	6	3
Title II, section 504 (handicap)	445	917	886
Learning disabled	106	244	247
Mental retardation	32	48	73
Other handicapped basis	11	45	108
Age	0	3	0
Multiple	0	0	1
Other	11	5	9
Total	476	969	933

***These issues designated** in resolved complaints*		**Number**	
Jurisdiction and basis	**1993**	**1994**	**1995**
Title VI (race/national origin)	6	49	44
Title IX (sex)	0	4	1
Title II, section 504 (handicap)	217	1,004	960
Learning disabled	65	247	273
Mental retardation	15	58	70
Other handicapped basis	3	41	88
Age	1	3	0
Multiple	0	0	2
Other	3	8	12
Total	226	1,068	1,019

***These issues designated** in initiated compliance reviews*		**Number**	
Jurisdiction and basis	**1993**	**1994**	**1995**
Title VI (race/national origin)	2	23	19
Title IX (sex)	1	1	0
Title II, section 504 (handicap)	5	8	0
Learning disabled	1	1	0
Mental retardation	0	1	0
Other handicapped basis	2	2	0
Age	0	3	0
Total	8	35	19

***These issues designated** in completed compliance reviews*		**Number**	
Jurisdiction and basis	**1993**	**1994**	**1995**
Title VI (race/national origin)	0	7	15
Title IX (sex)	0	2	0
Title II, section 504 (handicap)	8	3	6
Learning disabled	1	1	1
Mental retardation	1	0	1
Other handicapped basis	1	0	1
Age	0	0	0
Total	8	12	21

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* Issue codes S2400 through S2405, S2408 and S2499 are included in the table. Issues concerning the length of school day or school year for these students (Issues S2406 and S2407) are excluded from the table.

accessibility to extracurricular activities for disabled students, or accommodation.[122]

Complaints and Compliance Reviews—Assignment of Students with Physical and Mental Impairments

Complaints and compliance reviews raising issues pertaining to assignment of students with physical and mental impairments can be under any of the following jurisdictions and bases: Title VI (race/national origin), Title IX (gender), and Title II and section 504 (disability).

Complaints

From fiscal year 1993 to fiscal year 1995, approximately 94 percent of the complaints received and resolved by OCR (see table 3.10) that pertained to assignment of students with physical and mental impairments were under Title II or section 504, or the disability basis. Of the complaints pertaining to assignment of students with physical and mental impairments that cited disability as a basis, slightly more than one-quarter had a specific basis of learning disability. For instance, in fiscal year 1995, of the 934 complaints received by OCR pertaining to assignment of students with physical or mental disabilities that cited disability as a basis, 247 (or 26 percent) had a specific basis of learning disability. Another 73 (or 8 percent) cited mental retardation as the specific basis, and 108 (or 12 percent) cited the "other handicapped basis."

Between fiscal year 1993 and fiscal year 1995, OCR received approximately 2,379 complaints and resolved 2,312 complaints that pertained to the assignment of students with physical and mental impairments.[123] The number of complaints received by OCR that addressed the assignment of students with physical and mental impairments, increased from 476 in fiscal year 1993 to 969 in fiscal year 1994, and declined to 934 in fiscal year 1995. Similarly, the number of complaints resolved by OCR that addressed the assignment of students with physical and mental impairments, increased between fiscal year 1993 and fiscal year 1994 (from 226 to 1,069) and decreased slightly (to 1,017) between fiscal year 1994 and fiscal year 1995.

Compliance Reviews

Between fiscal year 1993 and fiscal year 1995, OCR initiated almost 60 and resolved 41 compliance reviews (see table 3.10) that raised the issue of assignment of students with physical or mental impairments. The number of compliance reviews initiated by OCR that addressed the assignment of students with physical and mental impairments increased substantially between fiscal year 1993 and fiscal year 1994 (from 8 to 31), but declined (to 19) in fiscal year 1995. The number of compliance reviews resolved by OCR which raised the issue of assignment of students with physical and mental impairments rose each year between fiscal years 1993 and 1995, increasing from 8 in fiscal year 1993, to 12 in fiscal year 1994, to 21 in fiscal year 1995.

In contrast to OCR's complaints that raised the issue of assignment of students with physical and mental impairments, the compliance reviews that addressed this issue cited the basis of race or national origin (Title VI) more frequently than the basis of disability (Title II or section 504).[124] Race or national origin was the most common basis cited in OCR's compliance reviews that pertained to assignment of students with physical or mental impairments.

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[122] *See* DOEd, OCR, *Using OCR's Case Information System for Windows (CIS II)*, Aug. 8, 1995, pp. IS–1 - IS–9 for a list of issues included and not included among "assignment of students with physical and mental impairments."

[123] Between fiscal years 1993 and 1995, OCR received 8,155 complaints with respect to possible disability discrimination. In fiscal year 1996, the agency received 2,473 complaints under this jurisdiction. *See* Carol Innerst, "Federal Bias Watchdog Overzealous, Some Say," *The Washington Times*, Nov. 12, 1996, pp. A1 and A24.

Complaints and Compliance Reviews—Assignment of Students with Physical and Mental Impairments on the Basis of Race or National Origin

Narrowing the issue of assignment of students with physical and mental impairments to only those issues citing race or national origin as a basis is one way of estimating the frequency with which issues related to overrepresentation (or underrepresentation) of minorities in special education may be raised in OCR's complaints and compliance reviews. The following discussion considers only those complaints raising the issue of assignment of students with physical and mental impairments that are made on the basis of race or national origin (Title VI).

Between fiscal year 1993 and 1995, OCR received approximately 32 complaints that raised the issue of assignment of students with physical and mental impairments, with a basis of race or national origin (see table 3.11). In fiscal year 1993, the number of complaints received (5) by OCR was greater than the number of OCR's resolved complaints (3), which raised the issue of assignment of students with physical and mental impairments with a basis of race or national origin. In fiscal year 1994, the number of complaints received (15) and resolved (14) by OCR that related to assignment of students with physical and mental impairments, with a basis of race or national origin, were both higher than in fiscal year 1993. In fiscal year 1995, the number of complaints received (12) and resolved (15) by OCR which related to assignment of students with physical and mental impairments, with a basis of race or national origin, were both about the same as they were fiscal year 1994.

From fiscal year 1993 to 1995 inclusive, about 30 compliance reviews (see table 3.11) initiated by OCR pertained to assignment of students with physical and mental impairments with a basis of race or national origin.

Complaints and Compliance Reviews—Assignment of Students with Learning Disabilities

Between fiscal years 1993 and 1995, OCR received almost 600 complaints which raised the issue of assignment of students with learning disabilities (see table 3.12).

Very few (2) of OCR's initiated compliance reviews during fiscal years 1993 through 1995 addressed the issue of assignment of students with learning disabilities (see table 3.12).

Complaints and Compliance Reviews—Assignment of Students with Mental Retardation

Between fiscal years 1993 and 1995, OCR received slightly more than 150 complaints that pertained to the assignment of students with mental retardation (see table 3.13).

During fiscal years 1993 through 1995, OCR initiated only one compliance review that raised the issue of assignment of students with mental retardation (see table 3.13).

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[124] Between fiscal year 1993 and 1995, OCR conducted 42 compliance reviews related to possible disability discrimination. In fiscal year 1996, the agency conducted nine reviews in the disability jurisdiction. *See* Innerst, "Federal Bias Watchdog Overzealous, Some Say," pp. A1 and A24.

TABLE 3.11

Assignment of Students to Special Education Programs on the Basis of Race, Ethnicity, or National Origin:* Complaint and Compliance Reviews Initiated, Closed, and Closed with Findings of Violation and No Violation by Region and Fiscal Year

Number of complaints by region

1993	**01**	**02**	**03**	**04**	**05**	**06**	**07**	**08**	**09**	**10**	**15**	**Total**
Complaints received		2		1		2						5
Complaints resolved				1				1	1			3
—Findings of violation												0
—Findings of no violation												0
Initiated compliance reviews					1						1	2
Resolved compliance reviews												0
—Findings of violation												0
—Findings of no violation												0

1994	**01**	**02**	**03**	**04**	**05**	**06**	**07**	**08**	**09**	**10**	**15**	**Total**
Complaints received	2			5	2	3	1		1	1		15
Complaints resolved	1	3		3	2	2	1		1	1		14
—Findings of violation												0
—Findings of no violation		1		1	2							4
Initiated compliance reviews			4	1	1	4			2	1		13
Resolved compliance reviews					1	1			2			4
—Findings of violation												0
—Findings of no violation									2			2

1995	**01**	**02**	**03**	**04**	**05**	**06**	**07**	**08**	**09**	**10**	**15**	**Total**
Complaints received		1	2	5		1			3			12
Complaints resolved	1	1	2	7		3			1			15
—Findings of violation												0
—Findings of no violation				5		1						6
Initiated compliance reviews	1	1	4	3	2	1		4				16
Resolved compliance reviews	1			2	3	1		2			1	10
—Findings of violation												0
—Findings of no violation											1	1

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*Issues included are those for Assignment of Students with Physical and Mental Impairments (S2400 through S2405, S2408 and S2499, but not those involving length of school day or year—S2406 and S2407) when Race or National Origin has been designated as a jurisdiction/basis for the issue.

Note: Findings of Violation include a resolution of this issue coded as 44 Post-letter of finding settlement, 45 Settlement after administrative proceedings initiated, 46 Administrative proceedings resolution, and 47 Referred to DOJ for Enforcement. Findings of no violation include a resolution of this issue coded as 39 Complainant withdrew without benefit, 40 Insufficient factual basis for allegations, 41 Insufficient evidence for finding of violation, and 42 No violation Letter of Finding issued.

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TABLE 3.12
Assignment of Students with Learning Disabilities:* Complaint and Compliance Reviews Initiated, Closed, and Closed with Findings of Violation and No Violation, by Region and Fiscal Year

	Number of complaints by region											
1993	**01**	**02**	**03**	**04**	**05**	**06**	**07**	**08**	**09**	**10**	**15**	**Total**
Complaints received	20	3	12	6		21		4	29	1	10	106
Complaints resolved	4	2	4	5	1	5	1	3	35	1	4	65
—Findings of violation									1			1
—Findings of no violation						2			15			17
Initiated compliance reviews											1	1
Resolved compliance reviews										1		1
—Findings of violation												0
—Findings of no violation												0
1994	**01**	**02**	**03**	**04**	**05**	**06**	**07**	**08**	**09**	**10**	**15**	**Total**
Complaints received	25	8	19	30	9	56	15	7	37	3	35	244
Complaints resolved	38	7	20	23	8	62	15	7	31	5	31	247
—Findings of violation												0
—Findings of no violation	7	1	6	7	2	21	3	2	6	1	3	59
Initiated compliance reviews		1										1
Resolved compliance reviews											1	1
—Findings of violation												0
—Findings of no violation												0
1995	**01**	**02**	**03**	**04**	**05**	**06**	**07**	**08**	**09**	**10**	**15**	**Total**
Complaints received	20	16	37	36	12	28	22	4	24		48	247
Complaints resolved	23	12	43	44	12	38	19	7	32		43	273
—Findings of violation												0
—Findings of no violation	8	3	7	14	1	8	4	1	5		6	57
Initiated compliance reviews												0
Resolved compliance reviews		1										1
—Findings of violation												0
—Findings of no violation												0

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*Issues included are those for Assignment of Students with Physical and Mental Impairments (S2400 through S2405, S2408 and S2499, but not those involving length of school day or year—S2406 and S2407) when Learning Disabled has been designated as a jurisdiction/basis for the issue.

Note: Findings of Violation include a resolution of this issue coded as 44 Post-letter of finding settlement, 45 Settlement after administrative proceedings initiated, 46 Administrative proceedings resolution, and 47 Referred to DOJ for Enforcement. Findings of no violation include a resolution of this issue coded as 39 Complainant withdrew without benefit, 40 Insufficient factual basis for allegations, 41 Insufficient evidence for finding of violation, and 42 No violation Letter of Finding issued.

TABLE 3.13
Assignment of Students with Mental Retardation:* Complaint and Compliance Reviews Initiated, Closed, and Closed with Findings of Violation and No Violation by Region and Fiscal Year

Number of complaints by region

1993	01	02	03	04	05	06	07	08	09	10	15	Total
Complaints received	2		6	5	3	5			3		8	32
Complaints resolved			3	4	1	1			4		2	15
—Findings of violation												0
—Findings of no violation				2					3			5
Initiated compliance reviews												0
Resolved compliance reviews			1									1
—Findings of violation												0
—Findings of no violation												0
1994	**01**	**02**	**03**	**04**	**05**	**06**	**07**	**08**	**09**	**10**	**15**	**Total**
Complaints received	1	1	5	11	6	1	3		8	1	11	48
Complaints resolved	3	1	6	13	8	5	2	1	6		13	58
—Findings of violation												0
—Findings of no violation	2	1		1		1	1		3		5	14
Initiated compliance reviews				1								1
Resolved compliance reviews												0
—Findings of violation												0
—Findings of no violation												0
1995	**01**	**02**	**03**	**04**	**05**	**06**	**07**	**08**	**09**	**10**	**15**	**Total**
Complaints received	5		3	21	4	8	4		9	1	18	73
Complaints resolved	5		7	18	5	6	3		9	1	16	70
—Findings of violation												0
—Findings of no violation			4	7	1	1					1	14
Initiated compliance reviews												0
Resolved compliance reviews				1								1
—Findings of violation												0
—Findings of no violation												0

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*Issues included are those for Assignment of Students with Physical and Mental Impairments (S2400 through S2405, S2408 and S2499, but not those involving length of school day or year—S2406 and S2407) when Mental Retardation has been designated as a jurisdiction/basis for the issue.

Note: Findings of Violation include a resolution of this issue coded as 44 Post-letter of finding settlement, 45 Settlement after administrative proceedings initiated, 46 Administrative proceedings resolution, and 47 Referred to DOJ for Enforcement. Findings of no violation include a resolution of this issue coded as 39 Complainant withdrew without benefit, 40 Insufficient factual basis for allegations, 41 Insufficient evidence for finding of violation, and 42 No violation Letter of Finding issued.

Complaints and Compliance Reviews—Assignment of Students with Behavioral Disabilities or Serious Emotional Disturbance

The following discussion addresses complaints and compliance reviews raising the issue of assignment of students with physical and mental impairments in which the specific basis raised was "other handicaps." Since students with behavioral disabilities or serious emotional disturbance are not given a distinct category in the OCR data base, it is presumed that they are included among students with "other handicaps." Although students with other disabilities also may be included in that category, for convenience of exposition, students with "other handicaps" are referred to below as students with behavioral disabilities or serious emotional disturbance.

From fiscal years 1993 to 1995 inclusive, OCR received approximately 164 complaints that addressed the issue of assignment of students with behavioral disabilities or serious emotional disturbance (see table 3.14).

During fiscal years 1993 through 1995, four of OCR's initiated compliance reviews were related to the issue of assignment of students with behavioral disabilities or serious emotional disturbance (see table 3.14).

Overall Uses of National Data on Students with Disabilities

National education data reflect the status and progress of educational opportunities for disabled and nondisabled students in the United States overall, and in some cases, based on their race/ethnicity, gender, and other characteristics. General data on educational inputs, outputs, measures of educational achievement, and indicators of educational attainment are published in a variety of sources, particularly by the U.S. Department of Education's education statistics arm, the National Center for Education Statistics, which publishes the *Digest of Education Statistics* and *The Condition of Education* annually. Data on students with disabilities receiving Federal aid under IDEA, Part B State Grant Programs or Chapter I of the Elementary and Secondary School Education Act are presented in the Department of Education's annual report to Congress on the implementations of the IDEA, *To Assure the Free Appropriate Public Education of All Children with Disabilities*.

Policymakers at the Federal, State, and local level, State and local education agencies, and school principals, guidance counselors, directors of special education, and teachers all rely on complete and accurate data to make decisions affecting the access to and participation in a quality education by students with disabilities.

Uses of Data on Education Resources

Data on educational inputs, in particular, provide crucial information on the essential components to structuring quality nondiscriminatory programs and for advancing equal educational opportunity for all students with disabilities. Students' access to and participation in specific educational programs are affected by the level of training and experience of instructors, the quality of the facilities in which they receive their education, as well as the quantity and quality of other resources, such as computers and textbooks.

Examination of data on these resources and inputs enables education researchers and policymakers to identify where potential inequities in various education programs occur. For instance, at the school district level, those in charge of special education can determine if trends in student/teacher ratios in classes for students with disabilities reveal a shortage of personnel.[125]

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[125] Experts in the field of instructing students with disabilities may determine that a shortage of special education teachers is occurring, based on their judgment of "high" student-teacher ratios. Lack of appropriate attention given to students due to a high student-teacher ratio could be a barrier to equal educational opportunity within a school or within a specific education program.

TABLE 3.14

Assignment of Students with Behavioral Disabilities or Serious Emotional Disturbance:* Complaint and Compliance Reviews Initiated, Closed, and Closed with Findings of Violation and No Violation by Region and Fiscal Year

	Number of complaints by region											
1993	**01**	**02**	**03**	**04**	**05**	**06**	**07**	**08**	**09**	**10**	**15**	**Total**
Complaints received	4	2		3			1		1			11
Complaints resolved	1	1							1			3
—Findings of violation												0
—Findings of no violation												0
Initiated compliance reviews		1							1			2
Resolved compliance reviews									1			1
—Findings of violation												0
—Findings of no violation												0
1994	**01**	**02**	**03**	**04**	**05**	**06**	**07**	**08**	**09**	**10**	**15**	**Total**
Complaints received	1	5	12	3	1	4	4	1	10	3	1	45
Complaints resolved	4	7	7	6	1	3	5	1	4	2	1	41
—Findings of violation												0
—Findings of no violation		3		2	1		2			1		9
Initiated compliance reviews		2										2
Resolved compliance reviews												0
—Findings of violation												0
—Findings of no violation												0
1995	**01**	**02**	**03**	**04**	**05**	**06**	**07**	**08**	**09**	**10**	**15**	**Total**
Complaints received	2	13	33	20	2	2	10	1	27			108
Complaints resolved	2	7	27	15	2	1	7	1	25	1		88
—Findings of violation												0
—Findings of no violation	1	1	4	3		1	2		3			15
Initiated compliance reviews												0
Resolved compliance reviews		1										1
—Findings of violation												0
—Findings of no violation												0

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*Issues included are those for Assignment of Students with Physical and Mental Impairments (S2400 through S2405, S2408 and S2499, but not those involving length of school day or year—S2406 and S2407) when "Other Handicapped Basis" has been designated as a jurisdiction/basis for the issue.

Note: Findings of Violation include a resolution of this issue coded as 44 Post-letter of finding settlement, 45 Settlement after administrative proceedings initiated, 46 Administrative proceedings resolution, and 47 Referred to DOJ for Enforcement. Findings of no violation include a resolution of this issue coded as 39 Complainant withdrew without benefit, 40 Insufficient factual basis for allegations, 41 Insufficient evidence for finding of violation, and 42 No violation Letter of Finding issued.

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School district officials can use input data to determine which programs for students with disabilities (e.g., an inclusive education program for students with mild cognitive and physical disabilities; a separate facility for students with severe, multiple disabilities) have a disproportionate share of resources or are underserved. In addition, data on educational inputs can be used by State directors of special education to assess how their provision and allocation of resources across expenditure areas compares to the national average.

Resource data can assist local education agencies to address potential disparities in educational service provisions and prevent shortages of teachers and other personnel, facilities, laboratories, libraries, classrooms, technology, equipment, and supplies allocated to students with disabilities from occurring. Analysis of such data can alert State and local policymakers to examine the resources and personnel devoted to their special education programs and take steps to ensure that these elements are not limiting their students' opportunities or resulting in discrimination. Directors of special education can use trend data consistently to monitor the services offered to students with disabilities and identify any gaps in service provision.

Uses of Data on Education Placement Settings

Education policymakers use data to propose guidelines on instructional methods and for placement settings. Data on indicators of educational placement for students with disabilities show numbers and percentages of students with learning disabilities, mental retardation, serious emotional disturbance, and other disabilities who are educated in the regular classroom, resource room, separate classroom, and other more restrictive environments. For instance, national data indicate that from the late 1980s through the 1990s, there has been a movement of students classified as mentally retarded to less restrictive environments, reflected in fewer placements in separate classes in the 1993–1994 school year (57 percent) than in the 1989–1990 school year (61 percent), and more placements in the resource room in the 1993–1994 school year (26 percent) than in the 1989–1990 school year (20 percent) (see table 3.6).

Uses of Data on Educational Achievement

Data on nondiscriminatory and unbiased proficiency assessments of students' progress in core subjects can be used to assist education decisionmakers, especially at the local level, in placing disabled and nondisabled students in educational programs (e.g., gifted and talented, regular education standard or remedial classes, special education); grouping students with various disability types and severity levels to reflect differential mastery of basic subjects and/or literacy or problem-solving skills; reevaluating and regrouping students as needed to reflect changes in ability, proficiency, and performance levels in subjects; and determining appropriate classroom, instructional curriculum, or grade level modifications or accommodations to meet individual student needs.[126]

Scores on standardized aptitude and achievement tests can be compared between students enrolled in special versus regular education overall, and among students within distinct disability categories, such as mental retardation, serious emotional disturbance, and specific learning disabilities.

Education researchers also can examine data on national measures of achievement, such as scores on the National Assessment of Educational Progress. These data can reveal how well the Nation's students with disabilities overall are performing over time.

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[126] *See Equal Educational Opportunity Project Series*, vol. I, chap. 4.

Uses of Data on Indicators of Educational Attainment

Education researchers and policymakers can examine data on measures of educational attainment (e.g., high school dropout rates, rates of high school completion by diploma or certificate of attendance or completion, postsecondary school enrollment rates, and undergraduate degree attainment). At the national, State, or local levels, these data indicate how well students with disabilities overall, or students within a disability category, are performing over time. Also at any level, comparisons can be made between disabled and nondisabled students and among disability categories. Local education agencies within a particular State can compare results of particular education outcomes. State policymakers can use national trend data on measures of attainment to compare their State's performance to that of the Nation as a whole.

Chapter 4

The U.S. Department of Education's Enforcement of the Laws Affecting Students with Disabilities

Administrative Responsibility for Civil Rights Enforcement

The Office for Civil Rights

The primary office at the U.S. Department of Education (DOEd) responsible for enforcing the civil rights statutes is the Office for Civil Rights (OCR). OCR enforces Title VI of the Civil Rights Act of 1964,[1] Title IX of the Education Amendments of 1972,[2] and section 504 of the Rehabilitation Act of 1973.[3] OCR's civil rights implementation and enforcement activities include civil rights policy development and dissemination, investigation of complaints alleging discrimination by recipients of Department of Education financial assistance, and initiation of enforcement actions against recipients who do not comply with civil rights requirements willingly. In addition, OCR undertakes proactive[4] activities to promote civil rights compliance and uncover and remedy instances of noncompliance. Such proactive activities include: conducting outreach and education to inform applicants, recipients, participants, and beneficiaries of Department of Education-funded programs about civil rights requirements; providing technical assistance to recipients to help them comply with civil rights requirements; and conducting compliance reviews of recipients to uncover and remedy violations of civil rights laws.[5]

In addition to OCR, two other Department of Education offices play roles in civil rights enforcement: the Office of Special Education and Rehabilitative Services (OSERS) and the Office of the General Counsel (OGC). The Office of Special Education and Rehabilitative Services interacts with OCR where section 504 issues overlap with issues related to the Individuals With Disabilities Education Act,[6] which is in its purview. To assist in the coordination of their efforts, OCR and OSERS operate under a memorandum of understanding instituted on July 29, 1987.[7]

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[1] 42 U.S.C. §§ 2000d to 2000d-7 (1994).

[2] 20 U.S.C. §§ 1681-1688 (1994).

[3] 29 U.S.C. § 794 (1994). In addition to these statutes, OCR also enforces the Age Discrimination Act of 1975 and Title II of the Americans with Disabilities Act of 1990, and OCR helps implement civil rights provisions in Title V, Part A, of the Elementary and Secondary Education Act. *See* U.S. Department of Education (DOEd), Office for Civil Rights (OCR), "Fiscal Year 1996 Budget Request," p. Z-9 (hereafter cited as OCR FY 1996 Budget Request).

[4] It should be noted that wherever the Commission uses the term "proactive" in this report it is referring to a more vigorous approach to implementation, compliance, and enforcement of present civil rights laws for students with disabilities and increased technical assistance and outreach and education activities.

[5] *See* U.S. Commission on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* (June 1996), chap. 5.

[6] Pub. L. No. 105–17 (1997).

[7] *See* Madeleine S. Will, Assistant Secretary, Office of Special Education and Rehabilitative Services (OSERS), and LeGree S. Daniels, Assistant Secretary, OCR, Memorandum of Understanding Between the Office for Civil Rights and the Office of Special Education and Rehabilitative Services, July 29, 1987, Policy Codification System Document No. 152 (hereafter cited

The Office of the General Counsel

The General Counsel serves as the principal advisor to the Secretary on all legal matters affecting departmental programs and activities.[8] With respect to civil rights, OGC reviews all civil rights regulations and policies developed by OCR before they are submitted to the Secretary of Education for approval and advises the Secretary as to their legal sufficiency. OGC brings together both program assistance and enforcement issues in the areas of race, national origin, age, gender, and disability.[9] Based on OGC's role as legal advisor to the Secretary, the General Counsel aims to ensure that OCR and the Office of Special Education and Rehabilitative Services, Office of Elementary and Secondary Education, and Office of Bilingual Education and Minority Language Affairs have consistent approaches to issues where there are overlapping areas of responsibility.[10]

With respect to civil rights enforcement, OGC is neither the legal arm of OCR nor a party to any administrative proceedings initiated by OCR. The General Counsel is responsible for all Federal court litigation involving the department, including civil rights litigation. Therefore, as a practical matter, the General Counsel often relies on OCR to perform much of the work relating to civil rights litigation, subject to the General Counsel's review.[11] A 1980 memorandum details the responsibilities of OGC and OCR with respect to three types of litigation activity: referral of cases to the Department of Justice, *amicus curiae* briefs, and defensive litigation. Civil rights cases are referred to the U.S. Department of Justice for litigation, and the Department recommends that the Department of Justice file an *amicus curiae* brief upon the advice of the Assistant Secretary for Civil Rights, after review by the General Counsel. In civil rights cases filed against the Department of Education, the General Counsel is responsible for coordinating the Department of Education's defense with the Department of Justice, and uses OCR's expertise and staff resources. Although OGC has primary responsibility for all litigation matters, OCR attorneys interact directly with the Department of Justice for most litigation.[12]

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as DOEd, OSERS/OCR Memorandum of Understanding).

[8] DOEd, Administrative Communications Systems, *Mission and Organizational Manual*, Office of the General Counsel, vol. I, part B (1992), p. 1 (hereafter cited as DOEd, *1992 Mission Manual OGC*). OGC's mission includes the following:

- Provides legal advice and services to the Secretary, Deputy Secretary, Principal Officers of the Department of Education, or any other person authorized to request such advice or services;
- Prepares and reviews public documents, rules, regulations issued by DOEd, and legal instruments entered into by the Department;
- Represents the Secretary, DOEd, or any of its officers or units in court or administrative litigation, except for administrative proceedings initiated by the Office for Civil Rights;
- Serves as liaison to other Federal agencies in connection with legal matters involving DOEd;
- Drafts legislation proposals originating in the Department and reviews the legal aspects of proposed or pending legislation; and
- Prepares or reviews briefs, memoranda, and other legal documents for proceedings involving the Department or requested by other government agencies for use in proceedings except for administrative proceedings initiated by the Office for Civil Rights. Ibid., p. 1.

[9] General Counsel and Acting Assistant Secretary for Civil Rights, DOEd, information memorandum to DOEd Secretary, June 10, 1980, "Civil Rights Enforcement Between the General Counsel and Assistant Secretary for Civil Rights," p. 1 (hereafter cited as DOEd, OGC/OCR Information Memorandum). In addition to the Immediate Office of the General Counsel, OGC has three major components: Program Service, Postsecondary and Departmental Service, and the Regulations and Legislation Service. The Office of the General Counsel also has an Operations Management Staff located in the Immediate Office of the General Counsel, which reports directly to the General Counsel. The Operations Management Staff is responsible for financial management and administrative services within OGC. *See* DOEd, 1992 *Mission Manual OGC*, p. 2.

[10] DOEd, OGC/OCR Information Memorandum, p. 2.

[11] Ibid., pp. 2–3.

In a recent interview, Judith Winston, the Department of Education's General Counsel and a civil rights attorney, described her role as follows: "As general counsel, I have the sole responsibility for referring cases" from the Department of Education to the Department of Justice, "so all of the legal work [on civil rights court litigation] that flows out of the department first flows through my office."[13]

The Office of Special Education and Rehabilitative Services

The Office of Special Education and Rehabilitative Services (OSERS) was created in 1966 as the Bureau of Education for the Handicapped[14] within DOEd's predecessor, the Office of Education in the Department of Health, Education, and Welfare. OSERS has broad responsibilities.[15] Among these responsibilities is the administration of education programs that serve the needs of children, youth, and adults with disabilities. Elementary and secondary education programs assisting children and youth with disabilities are only a portion of the programs administered by OSERS. OSERS's primary responsibility affecting public elementary and secondary education is to enforce the Individuals with Disabilities Education Act (IDEA),[16] known prior to 1990 as the Education of the Handicapped Act (or the Education for All Handicapped Children Act of 1975),[17] which entitles students with disabilities to a "free appropriate public education."[18]

The Office of Special Education Programs (OSEP) within OSERS has responsibility for administering early intervention, preschool, elementary, and secondary programs,[19] which include the following formula and discretionary programs:

- Assistance for Education of All Children with Disabilities: Grants to States (IDEA, Part B);[20]

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[12] Ibid., pp. 3-4.

[13] Judith Winston, General Counsel, DOEd, as cited in "Winston's Civil Rights Focus Stems From Her Work in the 60s," *Education Daily Special Supplement*, July 2, 1996, pp. 4-6.

[14] Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89–750, 80 Stat. 1191. *See* James A. Johnson et al., *Introduction to the Foundations of American Education* (Boston: Allyn and Bacon, 1991), p. 391.

[15] OSERS's mission is to:
- Meet the needs and develop the full potential of children with disabilities through the provision of special education programs and services;
- Provide resources to rehabilitating youth and adults with disabilities, so that dependency can be reduced and productive capacity can be enhanced;
- Increase knowledge about, foster innovation in, and improve the delivery of services for persons with disabilities through the performance or through provision of independent living and vocational rehabilitation services;
- Disseminate information about services, programs, and laws affecting persons who are disabled; and
- Provide information and technical assistance to State and local entities on best practices and model programs utilized by OSERS' non-Federal partners to improve the outcomes and efficiency of their service programs. *See* DOEd, OSERS, *Mission Manual* (1992), p. 1 (hereafter cited as DOEd, 1992 *Mission Manual OSERS*).

The National Institute for Disability Research and Rehabilitation of OSERS also conducts research designed to (a) promote understanding of the origins, management, and treatment of a wide range of disorders; as well as (b) acquire additional knowledge about the biological, psychosocial, and socioeconomic implications of disabilities on the persons affected and their families. *See* ibid.

[16] Pub. L. No. 101–476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400–1485 (1994)) *amended by* IDEA Amendments of 1997, Pub. L. No. 105–17.

[17] Pub L. No. 94–142, 89 Stat. 773 (as amended), *renamed* Individuals with Disabilities Education Act, Pub. L. No. 101–476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400–1485 (1994)) *amended by* IDEA Amendments of 1997, Pub. L. No. 105–17.

[18] *See* Pub. L. No. 105–17, § 602(8) (defining "free appropriate public education"); 612(a)(1) (1997). *See* pp. 30–37, 43–50 for further discussion of FAPE as it relates to OCR's section 504 implementation, compliance, and enforcement activities.

[19] *See generally* 34 C.F.R. Parts 300–399 (1996).

- Infants and Toddlers with Disabilities Program (IDEA, Part C);[21]
- State Program Improvement Grants for Children with Disabilities;[22]
- Improving Early Intervention, Educational, and Transitional Services and Results for Children with Disabilities through Coordinated Research and Personnel Preparation;[23]
- Improving Early Intervention, Educational, and Transitional Services and Results for Children with Disabilities through Coordinated Technical Assistance, Support, and Dissemination of Information;[24]
- Parent Training and Information Centers;[25]
- Technology Development, Demonstration, and Utilization, and Media Services.[26]

These and other early intervention, preschool, elementary, and secondary education programs assist in educating children with one or more of a broad range of disabilities. For example, the Infants and Toddlers with Disabilities and Part B Programs provide grants for the education of children with developmental delays[27] and/or children with certain identified disabilities, namely mental retardation; hearing impairments including deafness; speech or language impairments; visual impairments including blindness; emotional disturbance; orthopedic impairments; autism; traumatic brain injury; other health impairments; specific learning disabilities; deaf-blindness; or multiple disabilities.[28]

OCR's Interaction with the Program Offices

Although OCR is the sole office within DOEd with civil rights enforcement responsibilities, there is some level of interaction between OCR and the program offices to assist OCR in its work. This interaction stems from program offices providing information or referrals to OCR. For example, when each applicant for financial assistance under a DOEd program completes its application package, it must sign an assurance that it will comply with civil rights laws. If the program office, in reviewing an application, receives information that an applicant or grantee may not be in compliance with civil rights requirements, the program office provides OCR with this information on which OCR can then conduct followup activities. If an applicant or grantee requests from the program office information or technical assistance on civil rights issues, the program office will refer that applicant or grantee to OCR.[29] As the program office's civil rights function is limited to this review of application materials, OCR's role in the grant review process also is limited. OCR reviews regulations proposed by program offices, including selection criteria, for civil rights con-

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[20] *See* Pub. L. No. 105–17, §§ 611–619 (1997).

[21] *See id.*, §§ 631–645 (1997).

[22] *See id.*, §§ 651–656 (1997).

[23] *See id.*, §§ 671–674 (1997).

[24] *See id.*, §§ 681–687 (1997).

[25] *See id.*, § 682 (1997).

[26] *See id.*, § 687 (1997).

[27] The Part B program assists children with disabilities which may include children aged 3 to 9 experiencing developmental delays in one or more of the following areas, physical development, cognitive development, communication development, social or emotional development, or adaptive development and who, by reason thereof, need special education and related services. Pub. L. No. 105–17, § 602(3)(B)(i) (1997); 34 C.F.R. § 300.7(a)(2) (1996).

[28] Pub. L. No. 105–17, §§ 611–613 (1997) (authorizing grants); *id.*, § 602(3)(A)(i) (1997) (defining "child with a disability"); 34 C.F.R. § 300.7(a)(1) (1996).

[29] DOEd, Official Response to U.S. Commission on Civil Rights' Request for Information, Feb. 1, 1996, General Attachment No. 1 (hereafter cited as DOEd Official Response).

cerns. For example, OCR would review changes to DOEd's general administrative regulations, which apply to many discretionary grant programs and require a grant applicant to ensure that eligible project participants are selected without regard to race, color, national origin, gender, age, or disability.[30] However, OCR does not participate with the program offices in establishing specific criteria used to award Federal funds or in ensuring that equal educational opportunity principles are incorporated into that criteria.[31]

The interaction between OCR and the program offices also entails review of OCR draft regulations and policy documents to ensure that programmatic concerns are fully considered in the development of civil rights regulations and policy guidance. When OCR develops regulations or policy guidance, it provides these documents to the appropriate program offices for review prior to final issuance. For example, policy guidance on the provision of a "free appropriate public education" to students with disabilities would be reviewed by OSERS.[32]

Other than these two areas of interaction, OCR has had little formal communication with the program offices except when their statutory duties coincide, such as between OCR and the Office of Elementary and Secondary Education (OESE) relating to magnet school assistance programs.[33] OCR, however, maintains an active relationship with OSERS and follows the memorandum of understanding between the offices closely.[34] OCR does not have formal memoranda of understanding with the other program offices.[35] On an informal basis, OCR staff members occasionally work with the Office of Educational Research and Improvement's (OERI) regional laboratories when negotiating resolutions or developing technical assistance materials,[36] although this relationship is not consistently developed or utilized.

Based on the memorandum of understanding between OCR and OSERS, they "may undertake jointly, by mutual agreement, any or all of the following activities:

1. technical assistance;
2. investigation of any education agency;
3. the issuance of findings under the IDEA and Section 504;
4. the negotiations of remedies for violations found;
5. the monitoring of compliance plans; and
6. appropriate enforcement proceedings."[37]

The memorandum of understanding further specifies that "[w]hen policy is being formulated, by either OCR or OSERS, on any issue concerning the provision of a free appropriate public education, every effort will be made to consult on the issue prior to issuance of the policy."[38] In practice, OCR has worked closely with the Office of Special Education Programs (OSEP) within OSERS when developing section 504 policy,[39] and OCR has issued joint policy memoranda and policy letters with OSERS.[40]

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[30] 34 C.F.R. § 75.210(c)(5) (1996).

[31] The Office of Bilingual Education and Minority Language Affairs' (OBEMLA) former regulations did contain requirements that incorporated criteria essential to equal educational opportunity, such as parental notification, promotion of parental involvement, and teacher training. *See* 34 C.F.R. §§ 500.15, 500.21, 525.31, 501.42 (1994). However, DOEd withdrew these regulations as of July 1995. *See* DOEd, Official Response, "Office of Bilingual Education and Minority Languages Affairs," no. 4.

[32] DOEd, Official Response, General Attachment No. 1.

[33] Ibid.

[34] Jean Peelen, Enforcement Director, DC Metro Office, OCR, DOEd, interview in Washington, DC, May 28, 1996, p. 2 (Ms. Peelen is the former issue contact person for minority students in special education as the previous Director of Elementary and Secondary Policy Division) (hereafter cited as Peelen interview).

[35] *See* DOEd, Official Response (The Commission requested that OESE, OBEMLA, OSERS, and OERI provide copies of their memoranda of understanding with OCR. Only OSERS provided a memorandum of understanding.). Although there are no formal mechanisms for continual communications between OCR and other program offices, OCR contends that it participates in issues on an as-needed basis. Also, OCR contends that there has been a significant increase in interaction between OCR and other program offices as a result of the administration's education initiatives.

[36] *See* Susan Bowers, Senior Enforcement Director, OCR, DOEd, interview in Washington, DC, May 28, 1996, pp. 9–10 (Ms. Bowers is the former issue contact person on testing issues) (hereafter cited as Bowers interview).

[37] DOEd, OSERS/OCR Memorandum of Understanding, p. 2.

The memorandum of understanding specifies that the coordinators for the purposes of the joint agreement are, for OSERS, the Director of the Office of Special Education Programs and, for OCR, the Director of the Policy, Enforcement, and Program Service. The memorandum of understanding, however, reflects OCR's old organizational structure existing prior to OCR's 1996 reorganization.[41] The staff member who currently serves as OCR's coordinator for the memorandum of understanding with OSERS under OCR's new organizational structure is the Program Legal Acting Director.

The memorandum of understanding outlines the process for handling complaints received by OCR or OSERS that may overlap with the other's responsibilities.[42] OSERS should refer to OCR all complaints it receives that allege facts which, if true, would constitute a violation of section 504 and/or section 504 and the IDEA. OCR should investigate referred complaints under its usual complaint procedures and report to OSERS on the results. OCR should investigate any complaint directly filed with OCR that alleges facts which, if true, would constitute a violation of section 504 alone, or both the IDEA and section 504. If, at the beginning of its investigation, OCR determines that the complaint, or part of the complaint, alleges a violation of the IDEA only, it should refer the complaint or the relevant portion to OSERS.[43]

The memorandum of understanding specifies that OCR and OSERS should exchange information and materials in the area of children and youth who have disabilities, for dissemination to OCR regional offices, regional resource centers,[44] and other OSERS technical assistance centers, as appropriate. OCR should provide information on its regional offices' addresses and technical assistance contact persons, its technical assistance training courses, products and materials from its central inventory, and reports containing technical assistance information. OSERS should provide information on scheduled events and meetings relating to the education of children with disabilities, OSERS staff technical assistance plans, services and activities of regional resource centers, and products and materials related to technical assistance to students with disabilities. The memorandum of understanding also recognizes that OCR and OSERS can engage in joint technical assistance activities, such as the development of materials and training packages and the participation in conferences.[45] The exchange of information and joint technical assistance activities appear to provide a useful resource to OCR. OCR staff can gain an improved understanding of the pedagogical aspects of educating children and youths with disabilities. In addition, OCR staff has available informational resources to assist in developing remedies or offering alternative nondiscriminatory educational criteria and practices to schools.

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[38] Ibid.

[39] According to Jean Peelen, OCR works closely with the Office of Special Education Programs, particularly on the issue of minorities in special education, and OCR often taps into OSEP's resources. Peelen interview, p. 2.

[40] *See* Robert R. Davila, Assistant Secretary, OSERS, Michael L. Williams, Assistant Secretary, OCR, and John T. MacDonald, Assistant Secretary, Office of Elementary and Secondary Education, U.S. Department of Education, joint policy memorandum, Sept. 16, 1991, *reprinted in* 18 IDELR 116-19; Thomas Hehir, Director, Office of Special Programs, and Jeannette J. Lim, Director, Policy, Enforcement and Program Service, OCR, DOEd, letter to Michele Williams, Advocates for Children's Education, Miami, FL, Mar. 14, 1994.
The memorandum of understanding specifies, "Whenever possible, the offices will issue jointly developed policy, after appropriate consultation with OGC." DOEd, OSERS/OCR Memorandum of Understanding, p. 2.

[41] *See* Brian C. Ganson, Executive Assistant to the Assistant Secretary, OCR, DOEd, interview in Washington, DC, June 24, 1996, pp. 1-3 (discussing OCR's new organizational structure).

[42] For OCR, "complaints" means written statements alleging facts which, if true, would constitute a violation of section 504 or Title II of the ADA. It does not include inquiries that only solicit OCR's interpretation of the law or OCR's policies. If OSERS receives a "complaint," i.e., a statement that a public agency has violated Part B of IDEA and facts on which that allegation is based, OSERS refers the complaint to the SEA who has jurisdiction over the child or group of children with disabilities for resolution in accordance with State complaint procedures. 34 C.F.R. §§ 300.600–300.662. A "complaint" does not include inquiries that only solicit OSERS's interpretation of the law or OSERS's policies. DOEd, OSERS/OCR Memorandum of Understanding, p. 3.

[43] Ibid., pp. 3-4.

[44] Regional resource centers are facilities established under one of the IDEA Federal grants programs. These centers provide many services, in the nature of consultation, technical assistance, and training, to State educational agencies, local school systems, and other public agencies providing early intervention services. *See* Pub. L. No. 105–17, § 685(a) (1997).

OCR's Responsibilities for Section 504 of the Rehabilitation Act of 1973

Section 504

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against an otherwise qualified individual with a disability on the basis of that disability, under any federally assisted or federally conducted program or activity.[46] Section 504 applies to any elementary or secondary education program or activity as long as the program or activity receives Federal financial assistance. "Program or activity" is defined as "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government" or "a local educational agency . . . system of vocational education, or other school system."[47] It, therefore, includes the operations of a State department of education, special school districts, and public elementary and secondary school systems.

As an executive agency providing Federal financial assistance to schools, colleges, and universities through the country, DOEd has responsibility to issue regulations as necessary to implement section 504[48] and to ensure compliance with and enforce section 504 for the federally funded programs within its purview. OCR is the primary office within DOEd responsible for performing these functions. Section 504 provides that the remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964[49] are available for violations under section 504.[50] Therefore, DOEd may deny a request for funding by any applicant, or terminate existing funding to any recipient, found in violation of section 504 or the section 504 regulations, after an opportunity for an administrative hearing and voluntary compliance.[51]

Although the language of section 504 does not expressly permit individuals to file private lawsuits, many lower courts have recognized that section 504 affords a private cause of action against the recipients of Federal funds.[52] In section 504 employment cases, the remedies, procedures and rights set forth in Title VII of the Civil Rights Act of 1964[53] and Title I of the ADA are available.[54] However, a court may take into account the reasonableness of the cost of any necessary work place accommodation and the availability of alternatives or other appropriate relief.[55] In addition, the language of section 504 permits a prevailing party, "in any action or proceeding to enforce or charge a violation" of section 504, to recover a reasonable attorney's fee as part of the costs.[56]

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[45] DOEd, OSERS/OCR Memorandum of Understanding, p. 5.

[46] 29 U.S.C. § 794(a) (1994).

[47] *Id.*, § 794(b) (1994).

[48] *Id.*, § 794 (1994).

[49] 42 U.S.C. § 2000d to 2000d–7 (1994). Title VI prohibits exclusion from participation in, denial of the benefits of, or discrimination under any program or activity receiving Federal financial assistance, on the basis of race, color, or national origin. *Id.*

[50] 29 U.S.C. § 794a(a)(2) (1994).

[51] *See* 42 U.S.C. §§ 2000d–1 (1994).

[52] *See, e.g.*, Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981); Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981), *reh'g denied*,

Section 504 establishes an Interagency Disability Coordinating Council composed of the heads of several Federal agencies, including the Secretary of Education.[57] The Council is responsible for developing and implementing agreements, policies, and practices designed to (1) maximize effort; (2) promote efficiency; (3) eliminate conflict, competition, duplication, and inconsistencies among the operations, functions, and jurisdictions of various Federal departments, agencies, and branches; and (4) coordinate operations, functions, and jurisdictions of various Federal departments and agencies. It also conducts studies and activities to identify methods for overcoming barriers to integration into society, dependence, and productivity of individuals with disabilities.[58]

The Council has served as an active and useful way for ensuring consistency in the implementation and enforcement of disabilities laws. The Council has held meetings throughout the 1980s and 1990s. It has responded to recent developments in disabilities law, such as passage of the Americans with Disabilities Act (ADA) in 1990. For example, it had agencies brief the Council on their ADA implementation activities pertaining to regulatory development, technical assistance, and enforcement, and subsequently, it disseminated to Federal agencies a revised policy statement designed to assist agencies in understanding their responsibilities under the ADA.[59]

Section 504 and the Relationship to Title II of the Americans with Disabilities Act

Title II of the ADA prohibits discrimination because of a person's disability in all services, programs, and activities provided or made available by any public entity.[60] Unlike section 504, protection under Title II of the ADA is not dependent on receiving Federal financial assistance. The provisions of Title II apply regardless of Federal funding as long as the school is operated by or an instrument of State or local government.[61] Although the language of Title II and its im-

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664 F.2d 291 (5th Cir. 1981), *cert. denied* 455 U.S. 946 (1981); Anderson v. Banks, 520 F. Supp. 472 (D.C. Ga. 1981); Philipp v. Carey, 517 F. Supp. 513 (N.D.N.Y. 1981); Halderman v. Pennhurst State Sch. and Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd in part on other grounds*, 612 F.2d 84 (3d Cir. 1979), *rev'd on other grounds*, 451 U.S. 1, *on remand*, 673 F.2d 647 (3d Cir. 1982).

[53] 42 U.S.C. §§ 2000e–2000e17 (1994).

[54] 29 U.S.C. § 794a(a)(1) (1994).

[55] *Id.*

[56] *Id.*, § 794a(b) (1994).

[57] 29 U.S.C. § 794c(a) (1994). Members of the Council include the Secretaries of Education, Health and Human Services, Labor, Housing and Urban Development, and Transportation; the Assistant Secretary of Transportation; the Assistant Secretary of the Interior for Indian Affairs; the Attorney General; the Director of the Office of Personnel Management; the Chairpersons of the Equal Employment Opportunity Commission and the Architectural and Transportation Barriers Compliance Board; and such other officials as may be designated by the President. *Id.*

[58] *Id.* at § 794c(b) (1994).

[59] U.S. Commission on Civil Rights, *Title VI Enforcement*, pp. 123–24.

[60] 42 U.S.C. § 12,132 (1994).

[61] *See id.* § 12,132. *See also* Michael L. Williams, Assistant Secretary for Civil Rights, DOEd, memorandum to OCR Senior

plementing regulations make no specific mention of elementary and secondary education, Title II has been interpreted to be consistent with section 504, except where the ADA adopts a different standard.[62] A 1992 OCR policy memorandum clarifies that "provisions under Title II are to be construed to cover discriminatory conduct that is specifically prohibited under Subparts D, E and F of section 504 [regulations]."[63] The policy indicates that the same analysis for determining whether a student with a disability has received a free appropriate public education under section 504 would apply for a Title II case.[64] Consequently, OCR treats all section 504 complaints against public elementary and secondary schools as Title II ADA complaints. The complaints are considered "dual Section 504/Title II complaints."[65] Because the more substantive provisions of section 504 concerning elementary and secondary school children are incorporated in Title II of the ADA, the same analysis in this report applies to allegations brought under both unless otherwise noted.

OCR'S Rulemaking and Policy Implementation of Section 504

In fulfilling its responsibilities under section 504, OCR has established a progressive civil rights program that incorporates many education principles and theories fundamental to promoting equal educational opportunity. Beginning with its first steps to implement section 504, through the creation of regulations,[66] OCR relied heavily on the comments and views of educators, education organizations, education research groups and disability advocacy organizations.[67] In current efforts to implement, ensure compliance with, and enforce section 504, OCR has continued to integrate education principles and theories into its civil rights program. For example, OCR has drawn upon the knowledge and advice of education experts and education research organizations in two areas: policymaking and remedies.[68] OCR has relied on standards of professional education organizations in developing policy and compliance standards under section 504.[69] OCR

Staff, Nov. 19, 1992, *reprinted in* 19 IDELR 859, 860 (hereafter cited as 19 IDELR 859).

[62] *See* 42 U.S.C. § 12,201(a)&(b) (1994); 56 Fed. Reg. 35,696 (1991). *See also* 19 IDELR 859, 860.

[63] 19 IDELR 859, 860.

[64] *Id.*, pp. 860, 868.

[65] *Id.*, 859. Although Title II of the ADA is relevant to a study of the public education provided to students with disabilities, Title II will not be discussed in great detail since it has been interpreted consistent with section 504 in the context of public elementary and secondary education programs. The reader should be mindful that discussion in this report of OCR's section 504 compliance and enforcement activities can be read as a discussion of both section 504 and Title II of the ADA. To the extent that OCR's analyses or approaches under Title II would differ from that under section 504, they will be noted in the report.

[66] For purposes of this report, section 504 regulations refers to OCR's Part 104 regulations relating to nondiscrimination on the basis of disability in federally assisted programs. This report will not discuss the implementation, compliance, or enforcement of DOEd's Part 105 regulations relating to nondiscrimination on the basis of disability in programs conducted by DOEd.

[67] OCR sought public comments by disseminating several drafts of proposed rulemaking. On May 17, 1976, OCR, then part of the U.S. Department of Health, Education, and Welfare, sought public comment on six identified critical issues. *See* 41 Fed. Reg. 20,296 (1976); DOEd, OCR, *OCR Handbook for the Implementation of Section 504 of the Rehabilitation Act of 1973* (April 1981), pp. 18–19 (hereafter cited as DOEd, *OCR Handbook*). Over 300 written comments were received in response, and OCR supplemented the written comments with a series of 10 meetings conducted by OCR at various locations throughout the country. On July 16, 1976, OCR published a Notice of Proposed Rulemaking analyzing the comments received on the critical issues. OCR received a total of more than 700 comments in response to the Notice of Proposed Rulemaking and held an additional 22 public meetings prior to issuing the final rule. *See* 42 Fed. Reg. 22,676 (1977); DOEd, *OCR Handbook*, pp. 18–19.

[68] Peelen interview, p. 1.

also has consulted with education experts from State universities and State education agencies on specific issues in cases and in developing corrective action plans.[70]

The program offices within DOEd are another source of educational research and information available to OCR. For example, the Research to Practice Division of the Office of Special Education Programs (OSEP) provides leadership on and oversees the implementation of knowledge development, transfer, and use to improve educational results for infants, toddlers, children, and youth with disabilities. In fulfilling this mission, it oversees discretionary grants, cooperative agreements, and contracts for projects administered by OSEP.[71] The Office of Educational Research and Improvement (OERI) funds basic research aimed at enriching fundamental understanding of learning, teaching, and schools and supports applied research to improve curriculum, teaching, instructional techniques, schools, and assessment.[72] Information and research arms within its purview include the National Center for Education Statistics, five research institutes,[73] and the National Library of Education.[74]

OCR has used education experts from or projects or sources funded through these program offices to assist in cases and in the development of policy and technical assistance materials.[75] For example, on an informal basis, OCR staff members occasionally work with OERI's regional laboratories when negotiating resolutions or developing technical assistance materials.[76] OCR also has worked with Project Forum, a project funded by OSEP and operated under the auspices of the National Association of State Directors of Special

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[69] *See* Harry M. Singleton, Assistant Secretary for Civil Rights, OCR, DOEd, memorandum to John E. Palomino, Acting Regional Civil Rights Director, Region IX, "*San Francisco Unified School District*, OCR Case #09-85-1013—Policy Request," Apr. 4, 1985, p. 2, Policy Codification System Doc. No. 00057 (hereafter cited as Singleton, OCR Case #09-85-1013 Policy Request); Harry M. Singleton, Assistant Secretary for Civil Rights, OCR, DOEd, memorandum to Gilbert D. Roman, Regional Civil Rights Director, Region VIII, "Special Education Test Validity and Reliability—Docket No. 08833001," Feb. 29, 1984, p. 1, Policy Codification System Doc. No. 00053 (hereafter cited as Singleton, "Special Education Test Validity and Reliability" Policy).

[70] *See* Mai Cavalli, Regional Issue Coordinator on Minorities in Special Education, OCR Region IV, DOEd, interview in Atlanta, GA, June 4, 1996, p. 2 (hereafter cited as Cavalli interview); Bob Doesickle, Technical Assistance Specialist, Section 504, and Equal Opportunity Specialist, OCR, Region IV, DOEd, interview in Atlanta, GA, June 4, 1996, p. 2 (hereafter cited as Doesickle interview); William Lee Wilthank, Team Leader, Compliance Division II, OCR, Atlanta Office, DOEd, interview in Atlanta, GA, June 4, 1996, p. 3 (hereafter cited as Wilthank interview); Linda Colón, Team Leader, OCR, Region II, DOEd, telephone interview, June 12, 1996, p. 1 (hereafter cited as Colón interview).

[71] OSEP, "Functional Statement and Organization Charts," attached to Judith E. Heumann, memorandum to Joseph Colantuoni, Director, Management Systems Improvement Group, OSERS, DOEd, "Request for Approval of the Reorganization of the Office of Special Education Programs," May 9, 1996.

[72] Richard Atkinson and Greg Jackson, eds., *Research and Education Reform: Roles for the Office of Educational Research and Improvement* (Washington, DC: National Academy Press, 1992), pp. 5, 59, and 60.

[73] These research institutes are (1) the National Institute on Student Achievement, Curriculum, and Assessment; (2) the National Institute on the Education of At-Risk Students; (3) the National Institute on Early Childhood Development and Education; (4) the National Institute on Educational Governance, Finance, Policy-Making, and Management; and (5) the National Institute on Postsecondary Education, Libraries, and Lifelong Learning. U.S. Department of Education, Office of Educational Research and Improvement, *Mission Manual*, Apr. 17, 1995, sec. "OERI/INT," p. 3 (hereafter cited as DOEd, *1995 Mission Manual OERI*).

[74] Ibid., pp. 2–3.

[75] *See* Peelen interview, p. 2; Archie B. Meyer, Sr., Regional Director, OCR, Atlanta Office, DOEd, telephone interview, June 4, 1996, p. 3. *But see* Doesickle interview p. 2 (When asked whether he used the services of educational experts in OERI or the program offices in conducting his work, Doesickle indicated that they have never been made available to him.); Colón interview, pp. 1–2 (When asked whether her regional office works with OSEP, Ms. Colón indicated that she was not aware that her office worked with OSEP, although some other team or "the Chief" within her office may have contacted OSEP on occasion.).

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Education. The project is designed to develop promising practices to reduce the number of minority children referred for special education. OCR released a "resource guide" which describes some promising practices in this area and identifies educational experts on various alternative strategies in April 1997.[77]

This collaboration appears to have served as a useful resource to OCR's work. The program offices have offered a practical means for OCR to acquire greater knowledge of education issues and information on successful educational practices and the latest educational research. OCR's use of the program offices has been on an informal and ad hoc basis. It has not developed any formal or consistent practice of consulting the program offices for educational information, although there are potential ways in which such collaboration could work. According to one of the Senior Enforcement Directors for OCR, OERI offered to provide training to the OCR regional offices on issues those offices address. She was unsure whether OCR had accepted the offer, although she thought that if OCR had not, it should in the next year. In discussing other useful ways for OCR to collaborate with the program offices, she noted that it would be helpful to have OERI's library electronically accessible to OCR.[78]

Section 504 Regulations

The foundation for OCR's section 504 enforcement efforts is the regulations implementing section 504 of the Rehabilitation Act of 1973 as it relates to federally assisted programs.[79] The section 504 regulations are extremely detailed in addressing aspects fundamental to ensuring equality of educational opportunities for persons with disabilities. Subpart A of the section 504 regulations contains a general provision prohibiting exclusion from participation in, denial of the benefits of, or otherwise subjecting to discrimination a qualified person with a disability under any program or activity receiving Federal financial assistance.[80] The regulations also specify certain prohibited discriminatory actions. A recipient of Federal financial assistance may not, "directly or through contractual, licensing, or other arrangements," take the following actions, on the basis of a disability:

> i. Deny a qualified [individual with a disability] the opportunity to participate in or benefit from an aid, benefit, or service;
>
> ii. Afford a qualified [individual with a disability] an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others;
>
> iii. Provide a qualified [individual with a disability] an aid, benefit, or service that is not as effective as that provided to others;
>
> iv. Provide different or separate aid, benefits, or services to [individual with a disability] or to any class of [individual with a disability] unless this action is necessary to provide qualified [individual with a disability] with aid, benefits, or services that are as effective as those provided to others;
>
> v. Aid or perpetuate discrimination against a qualified [individual with a disability] by providing significant assistance to an agency, organization, or person that discriminates on the basis of [disability] in providing any aid, benefit, or service to beneficiaries of the recipient's program;
>
> vi. Deny a qualified [individual with a disability] the opportunity to participate as a member of a planning or advisory boards; or

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[76] *See* Bowers interview, pp. 9–10.

[77] *See* Office of Special Education Programs, DOEd, *Addressing the Disproportionate Representation of Students from Racial and Ethnic Minority Groups in Special Education: A Resource Document*, by Joy Markowitz, Shernaz B. García, and Joy (Hicks) Eichelberger, prepared by Project FORUM, National Association of State Directors of Special Education, March 1997. *See also* Peelen interview, pp. 2, 6.

[78] Bowers interview, p. 10.

[79] *See* 34 C.F.R. pt. 104 (1996). The regulations implementing section 504 relating to federally conducted programs are found at 34 C.F.R. pt. 105 (1996).

[80] *See* 34 C.F.R. § 104.4(a) (1996).

vii. Otherwise limit a qualified [individual with a disability] in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.[81]

In addition, the regulations require that recipients of Federal financial assistance make adjustments to regular programs or provide special treatment as necessary to afford qualified persons with disabilities an "equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs."[82]

Beyond subpart A of the section 504 regulations, two other subparts apply to elementary and secondary education of students with disabilities. Subpart C contains a prohibition against the denial of benefits of, exclusion from participation in, or discrimination under any program or activity receiving Federal financial assistance, because the recipient's facilities are inaccessible to or unusable by persons with disabilities.[83]

Subpart D is specifically devoted to preschool, elementary, and secondary education.[84] This subpart provides detailed guidance to school districts in their educational practices relating to students who require special education and related services or who require adjustments to the regular educational curriculum because of their disabilities. The provisions of subparts C and D and the general nondiscriminatory provisions of subpart A form the basis for determining the rights of students with disabilities and their parents or guardians and the requirements of public elementary and secondary schools in the United States.[85] In addition to subparts A, C, and D, OCR included an appendix to the section 504 regulations that provides analysis on the regulations' specific provisions.[86] The discussions in the appendix provide detailed guidance and clarification of many of the regulations' provisions.

Scope of Coverage

Although there is some similarity in the regulations implementing Part B of the IDEA[87] and those implementing section 504, their applicability to elementary and secondary education programs may differ. Part B requirements under the IDEA apply to the State receiving funds[88] and all political subdivisions within the State that are involved in the education of children with disabilities.[89] Once a State accepts funds (and all do), the State and all political subdivisions within the

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[81] 34 C.F.R. § 104.4(b). Despite the change in section 504 to use the term "individual with a disability" in place of "handicapped person," DOEd/OCR has not yet revised the reference to "handicapped persons" throughout the regulations. However because the term "individual with a disability" is in the statute and the commonly accepted term, this report will use the term when referring to the section 504 regulations.

[82] 34 C.F.R. § 104.4(b)(2).

[83] *See* 34 C.F.R. § 104.21. *See also* 34 C.F.R. § 104.22(b). Often the issue of program accessibility arises with students who have physical disabilities. Since the Commission's focus in this report is the education for students classified as having certain types of disabilities—mental retardation, learning disabilities, behavioral disabilities, and emotional disturbance, the report will focus less on subpart C of the section 504 regulation and OCR's activities related to that subpart. That subpart will be discussed only to the extent that it relates to students with mental retardation, learning disabilities, behavioral disabilities, or emotional disturbance.

[84] *See* 34 C.R.F. pt. 104, subpt. D.

[85] Subparts A, C, and D of the U.S. Department of Education's section 504 regulations also apply to private elementary and secondary schools and to public or private preschools if these schools receive Federal financial assistance. *See id.* §§ 104.2, 104.31.

[86] *See* 34 C.F.R. pt. 104, app. A, subpts. A & D.

[87] *See* 34 C.F.R. pt. 300.

[88] All States, the District of Columbia, and all U.S. territories receive funds under Part B of the IDEA.

[89] 34 C.F.R. § 300.2 (1996).

State that are involved in the education of children with disabilities must comply with Part B. Section 504 requirements apply to a school when the school is receiving financial assistance under *any* Federal financial assistance program, which may or may not be Part B of the IDEA.

Scope of Protection

Section 504 regulations apply to "qualified [individuals with a disability]."[90] In addition, provisions in subpart D grant some rights to parents or guardians of "qualified [individuals with a disability]."[91] Despite the change in section 504 of the Rehabilitation Act to use the term "individual with a disability" in place of "handicapped person,"[92] DOEd/OCR retains the reference to "handicapped persons" throughout the regulations.[93]

Defining an "Individual with a Disability"

In the context of public preschool, elementary, and secondary education, the section 504 regulations define an "individual with a disability" as a student who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.[94] The regulations define the term "physical or mental impairment" as follows:

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[95]

DOEd/OCR has specified in the analysis of the section 504 regulations that a "physical or mental impairment does not constitute a [disability] for the purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities."[96] The regulations define "major life activities" as functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.[97] When the regulations were promulgated in 1977, DOEd/OCR, however, did not offer a definition for what constitutes a substantial limitation, noting "[t]he Department does not believe that a definition of this term is possible at this time."[98]

Because the regulations include the disabilities of mental retardation and specific learning disabilities as examples of a mental impairment, it is clear that students diagnosed with mental retardation and/or learning disabilities are protected under the section 504 regulations. DOEd/OCR interprets the term "specific learning disabilities" as it is used in the IDEA.[99] Although the section 504 regulations do not include the terms "emotional disturbance" or "behavioral disability" in the examples they provide, they do include "emotional or mental illness." The term "emotional disturbance" often is used interchangeably with the terms "emotional illness" or "emotional disorders."[100] Regardless of the terminology used, all students with impairments such as mental retardation, specific learning disabilities, behavioral disabilities, or emotional disturbance, must show that they are "substantially limited in a major life activity" as a result of their impairment in order to have a "disability" under section 504 law.

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[90] *See* 34 C.F.R. § 104.4(a). The section 504 regulations still use the term "individual with a handicap" and "handicapped," however the Commission has chosen to replace this outdated language with the term "disability."

[91] *See* 34 C.F.R. § 104.3(k) (defining "qualified handicapped person"). *See, e.g., id.* § 104.32(b) (notice to parents or guardians); *id.* § 104.36 (procedural safeguards for parents or guardians including a right to examine relevant records, and a right to participate in impartial hearings). *See* chap. 7 for a discussion of these rights.

[92] *See* Pub. L. No. 102–569 § 102(p)(32), 106 Stat. 4360 (substituted "a disability" for "handicaps" and "disability" for "handicap" in first sentence).

[93] *See* 34 C.F.R. pt. 104 (1996). Hereafter, the term [individual with a disability] will substitute for "handicapped persons" throughout the report.

[94] 34 C.F.R. § 104.3(j) (1996).

[95] *Id.*, § 104.3(j)(2)(i) (1996).

[96] *See* 42 Fed. Reg. 22,685 (1977).

[97] 34 C.F.R. § 104.3(j)(2)(ii) (1996).

[98] *See* 34 C.F.R. pt. 104, app. A, subpt. A, no. 3 (1996). A definition and discussion of substantial limitation appears in the regulations implementing Title I of the ADA, which OCR looks to for guidance. 29 C.F.R. § 1630.2(j) (1996).

DOEd/OCR has noted in the appendix to the regulations that the definition for "physical or mental impairment" does not set forth a definitive list of specific diseases and conditions constituting physical or mental impairments. This is "because of the difficulty of ensuring the comprehensiveness of any such list."[101] Therefore, it is clear that behavioral disabilities could be a protected disability and that such disabilities are not necessarily excluded from the protection of the section 504 regulations. OCR has provided some policy guidance for attention deficit disorder, a condition that can include symptoms of behavior problems.[102]

DOEd/OCR's creation of a general definition presented in the regulations, together with the clarification in the appendix, is a practical way of defining the scope of those individuals protected. Persons with any type of physical or mental impairment are afforded the protections of the regulations as long as they meet the requirement for the rest of the definition for disability (i.e., they are "substantially limited in a major life activity"). In doing so, it does not include some disability types and exclude others. With the IDEA, only those children who have the specific types of disabilities listed in the statute are entitled to protections.

The appendix to the section 504 regulations indicates that there were several comments made during initial efforts to draft the regulations about whether the definition of "individual with a disability" was unreasonably broad. OCR's policy on this issue is a broad approach to defining disabilities. OCR specifies that "[t]he Department continues to believe . . . that it has no flexibility with the statutory definition to limit the term [handicapped person] to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps."[103] OCR has noted, however, limits to the definition. "[E]nvironmental, cultural, and economic disadvantage [unaccompanied by a physical or mental impairment] are not in themselves covered."[104] Children in need of remedial instruction, such as children who are behind a grade level or who are "slow learners" but who have not been diagnosed as having a specific learning disability or other disability, are not considered persons with disabilities.[105]

OCR has defined "persons who have a record of such an impairment" to apply to "persons who have a history of a handicapping condition but no longer have the condition," such as person with histories of mental or emotional illness. The provision also applies to "persons who have been incorrectly classified as having such a condition," such as those who have been misclassified as persons with mental retardation.[106]

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[99] 34 C.F.R. pt. 104, app. A, subpt. A, no. 3 (1996). *See* chap. 2, pp. 23–25 for a discussion of the IDEA definition for "specific learning disabilities."

[100] *See* chap. 2, pp. 26–29.

[101] 34 C.F.R. pt. 104, app. A, subpt. A, no. 3 (1996). *See also* 42 Fed. Reg. 22,685 (1977); DOEd, *OCR Handbook*, p. 65.

[102] It is unclear whether attention deficit disorder is a type of behavioral disabilities or a condition distinct from behavioral disabilities. *See* discussion at chap. 2, p. 30.

[103] 34 C.F.R. pt. 104, app. A, subpt. A (1996).

[104] *Id.*

[105] DOEd, *OCR Handbook*, pp. 70–71.

In guidance, OCR has noted that a person who is regarded as having a physical or mental impairment includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition ". . . [It] includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped."[107]

If a child is "regarded" as having a disability, FAPE (a free appropriate public education) and the need for an evaluation are not triggered unless there is reason to believe that the child has an "actual" disability.

Defining "Qualified"

In terms of public elementary and secondary education, OCR relies on an "age appropriate" standard for determining whether a child or youth with a disability is protected by section 504 regulations. A student with a disability is "qualified" if he or she is (i) of the age at which schools provide education to nondisabled students, (ii) of the age at which State law requires that students with disabilities receive educational services, or (iii) is a student to whom the State must provide a free appropriate public education under the IDEA.[108] Generally, as long as a student with a disability is of the age that nondisabled children or youth receive educational services, the student with a disability is protected under section 504 regulations. In addition, OCR has noted that it omits the word "otherwise" used in the statute "in order to comport with the intent of the statute because, read literally, 'otherwise' qualified handicapped persons includes persons who are qualified except for their handicap, rather than in spite of their handicap."[109]

Distinctions from the IDEA

The assurances of a free appropriate public education under Part B of the IDEA apply to children and youth with certain types of disabilities and who, because of those impairments, need special education and related services.[110] Unlike the section 504 regulations, which provide only examples of covered disability types, the IDEA lists specific types of disabilities to which the act applies:

1. mental retardation,
2. hearing impairments including deafness,
3. speech or language impairments,
4. visual impairments including blindness,
5. emotional disturbance,
6. orthopedic impairments,
7. autism,
8. traumatic brain injury,
9. other health impairments,
10. specific learning disabilities,[111]
11. deaf-blindness,
12. multiple disabilities,[112] and
13. children aged 3 to 9 experiencing developmental delays in physical development, cognitive development, communication development, social or emotional development, or adaptive development.[113]

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[106] 34 C.F.R. pt. 104, app. A, subpt. A (1996).

[107] *Id.*

[108] 34 C.F.R. § 104.3(k)(2) (1996).

[109] 34 C.F.R. pt. 104, app. A, subpt. A (1996).

[110] Pub. L. No. 105–17, § 602(A)–(B) (1997).

[111] *Id.*, § 602(26) (1997); 34 C.F.R. § 300.7(a)(1) (1996).

[112] 34 C.F.R. § 300.7(a)(1) (1996).

[113] Inclusion of students with these disabilities in this category is at a State's discretion with "developmental delays" defined by the State "and as measured by appropriate diagnostic instruments and procedures." *See* Pub. L. No. 105–17, § 602(3)(B)(i) (1997); 34 C.F.R. § 300.7(a)(1) (1996).

If a student and his or her parents or guardians are to have the rights accorded in Part B of the IDEA, the student must be identified by a public agency, as a child suspected of having a disability.

Unlike the IDEA, which covers only those children and youth who have specific disabilities and who, by virtue of their disabilities, require special educational services, section 504 extends to a broader group of individuals in elementary and secondary education. Section 504's coverage is broader from two perspectives. First, the section 504 regulations do not limit coverage to specific types of disabilities. Disabilities covered by section 504 can be any physical or mental impairment such as a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems[114] or any mental or psychological disorder[115] which substantially limits one or more major life activities.[116]

In determining whether OCR has jurisdiction in a section 504 case, OCR treats children and youth whom the school district has acknowledged to be covered by the IDEA as meeting the definition of being a person with a disability under section 504.[117] OCR has clarified that there are circumstances when a student is covered under section 504 and, thus, may receive appropriate educational services, even though the child or youth has been found ineligible for special education under the IDEA.[118]

The second way in which section 504's protection is broader than the IDEA is that section 504 covers all school-age children and youth with disabilities, whether or not they require special educational services.[119] The IDEA definition of children and youth with disabilities requires that they need special education because of their disabilities.[120] This distinction is apparent in two ways. First, section 504 covers students who may need only a related service but not special education. For example, if a student has diabetes and requires insulin shots at school in order to keep his or her medical condition under control, but he or she does not need special education services, the student would be protected under section 504 but not under the IDEA. Under section 504, the student could remain in the regular class on a full-time basis and is entitled to a related service of receiving insulin shots at school.[121] Second, the section 504 regulations specify that a "handicapped person" can include one who "has a record of such an impairment," or who "is regarded as having such an impairment."[122] OCR has clarified that these categories are "legal fictions" because "[t]hey are meant to reach situations where individuals either never were or are not currently handicapped, but are treated by others as if they were."[123] OCR has stated in policy guidance that:

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[114] 34 C.F.R. § 104.3(j)(2)(i)(A) (1996).

[115] *Id.*, § 104.3(j)(2)(i)(B) (1996).

[116] *Id.*, § 104.3(j)(1)(i) (1996).

[117] Joe Mahoney, Equal Opportunity Specialist, and Eva Das, Staff Attorney, OCR, Region III, DOEd, telephone interview, June 18, 1996, p. 2 (hereafter cited as Mahoney and Das interview).

[118] Michael L. Williams, Assistant Secretary for Civil Rights, DOEd, letter to Leona C. Gruzynski, Ph.D, Director of Pupil Services, Baltimore County Public Schools, May 21, 1991, p. 1, Policy Codification Document No. 00008.

[119] Section 504 applies to "qualified handicapped persons" which, in the context of public elementary and secondary education, means a handicapped student if he or she is (i) of the age at which schools provide education to nondisabled students, (ii) of the age at which State law requires that students with disabilities receive educational services, or (iii) a student to whom the State must provide a free appropriate public education under the IDEA. 34 C.F.R. § 104.3(k) (1996).

[120] 20 U.S.C. § 1401(a)(1) (1994).

[121] Carolyn Madsen, Staff Attorney, OCR, Region X, DOEd, telephone interview, June 10, 1996, p. 5 (hereafter cited as Madsen interview). OCR Policy Codification Document 166, Oct. 24, 1988.

[122] 34 C.F.R. § 104.3(j) (1996).

> a person who falls under the second and third prongs of the definition of "handicapped person" is entitled to Section 504 protection only when the allegedly discriminatory action is based on the fact the [sic] he/she has a "record of" or is "regarded as" handicapped. Unless a person actually has a handicapping condition, the mere fact that he/she has a "record of" or is "regarded as" handicapped is insufficient, by itself, to trigger those Section 504 protections that require special treatment, (such as FAPE or reasonable accommodation), of persons with physical or mental impairments which substantially limit one or more major life activities.[124]

Therefore, if a student does not have a mental or physical disability, there can be no need for special education or related aids and services, and, therefore, there is no requirement to provide that student with a free appropriate public education. However, if negative action is taken based on the perception or record that the student has or had a disability, the student is entitled to protection against discrimination.[125]

OCR's General Policy and Approach to Enforcing Section 504

In assessing whether a school has complied with the requirements of section 504, OCR takes a process-oriented approach when conducting complaint investigations and compliance reviews. This approach is based on the policy established with initial issuance of the section 504 regulations, in 1977.[126] Under that policy, OCR refrains, except in extraordinary circumstances, from reviewing the results of individual placement and other educational decisions, "so long as the school district complies with the 'process' requirements" of subpart D of the regulations.[127] For example, OCR generally does not rely on its own opinion to conclude that a student needs a certain kind or amount of educational services to meet the student's educational needs. Instead, it relies on factual findings that a school system's staff had knowledge of a student's unmet educational need and that the school system took no action to address the concern. From those types of findings, OCR has concluded that a school system failed to provide a student with a free appropriate public education.[128] OCR has noted in policy guidance that it is not precluded from determining whether a placement or multidisciplinary committee acted irrationally or arbitrarily. However, "[s]uch a determination would be made with great caution in light of the 'extraordinary circumstances' clause in the Appendix" to section 504 regulations.[129]

For example, in policy guidance, OCR considered a case in which a school district's placement committee indicated on the IEP document that the discipline procedures applied to a student with a disability would be according to school district policy, such that the student could be suspended for some violations of school rules. In that particular case, the placement committee, in developing the IEP, was aware that an independent evaluator had recommended that the student not be suspended from school, because sus-

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[123] Komer memorandum, 19 IDELR 894.

[124] Ibid.

[125] Ibid.

[126] *See* 42 Fed. Reg. 22,690 (1977).

[127] 34 C.F.R. pt. 104, app. A, subpt. D (1996).

[128] *See* Gary D. Jackson, Regional Director, OCR, Region X, DOEd, letter to Robert L. Nelson, Superintendent, Seattle School District No. 1, re: Case No. 10–83–1007, Oct. 21, 1985, 352 EHLR 86 ("Although OCR cannot conclude the student necessarily needed the educational service, the teacher did believe it was needed and failed to take steps to ensure that an appropriate determination would be made."). *See also* Madsen interview, pp. 21–23 (noting that OCR finds procedural violations under section 504).

[129] LeGree S. Daniels, Assistant Secretary for Civil Rights, DOEd, memorandum to Jesse L. High, Regional Civil Rights Director, OCR, DOEd, "Request for Assistance, Muscogee County School District, Georgia," Feb. 24, 1989, p. 4 (hereafter cited as Daniels memorandum on "Request for Assistance, Muscogee County School District"). *See also* 34 C.F.R. pt. 104, app. A, subpt. D (1996).

pensions deprived him of the structure needed in his life, and suspensions were a form of punishment that he could not comprehend. The placement committee minutes stated that a behavior management plan would begin with the new school year. The minutes also stated that the committee agreed that the student was incapable of understanding the reasons for his erratic behavior. The IEP goals and objectives for the student were to improve the student's behavior. However, without comment, the committee checked an item on the IEP specifying that the school district's ordinary discipline policy and procedures would apply. In noting the inconsistency, OCR wrote: "It is, of course, possible that the Committee's act in checking off the item was unintentional. Assuming that it was intentional, under the circumstances in this case, you could find that this action of the Committee was so inconsistent with the Committee's conclusions as to the child's behavior expressed in the minutes and the text of the IEP that it was irrational."[130]

According to the Enforcement Director of the Washington, DC Metro Enforcement Office, OCR follows the policy (to refrain from reviewing educational decisions, except in extraordinary circumstances) closely in practice.[131] On those occasions when OCR looks at substantive, rather than procedural, issues, it may consult with education experts or others with expertise.[132]

OCR's Analytical Approach to the IDEA

In determining compliance with or analyzing section 504 issues, OCR uses the interpretations of IDEA, IDEA policies, or IDEA case law as a source of guidance when appropriate,[133] particularly when there is little section 504 case law or OCR guidance on the issue.[134] In general, there is more IDEA than section 504 case law addressing elementary and secondary education, and IDEA case law often is more specific with detailed guidance for particular issues.[135] Therefore, OCR identifies what analysis in an IDEA case is parallel to the section 504 case at issue, and it applies the IDEA case law as guidance.[136] For example, the IDEA offers time lines as compliance standards which OCR looks to for determining the reasonableness of school districts' actions.[137]

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[130] Daniels memorandum on "Request for Assistance, Muscogee County School District," pp. 2, 4.

[131] Peelen interview, p. 3. *See also* George Cole, Special Project Team Member, Vicki Johnson, Staff Attorney, and Rusty Rayfield, Equal Opportunity Specialist, OCR, Region VI, DOEd, telephone interview, June 26, 1996, p. 7 (hereafter cited as Cole, Johnson, and Rayfield interview) (In addressing whether a program is appropriate for a student with a disability, "we look at it from a procedural aspect, in terms of has the district followed 504 procedures in all respects, in terms of initial evaluation and placement activities. . .").

[132] Cole, Johnson, and Rayfield interview, p. 7.

[133] *See* LeGree S. Daniels, Assistant Secretary for Civil Rights, DOEd, memorandum to OCR Senior Staff, "Guidance Concerning Distinctions Between Section 504 and the Education of the Handicapped Act," Oct. 24, 1988, pp. 1–2. *See also* Judy Stover, Equal Opportunity Specialist, and Catherine Edwards, Staff Attorney, OCR, Region III, DOEd, telephone interview, June 18, 1996, p. 5 (hereafter cited as Stover and Edwards interview) (OCR uses IDEA case laws "to some extent. . . First, we try to find the 504 cases provided that the IDEA provisions and the 504 provisions are the same."); Lee Nell, Chief Regional Attorney, OCR, Region III, DOEd, telephone interview, June 11, 1996, p. 10 (hereafter cited as Nell interview) ("where the standards are the same we rely very heavily on IDEA cases"); Colón interview, p. 5 ("We enforce 504 and the ADA. We take IDEA in consideration, but we enforce Section 504 and the ADA."); Cavalli interview, p. 3; Madsen interview, p. 9; John Benjes, Chief Civil Rights Attorney, OCR, Region X, DOEd, telephone interview, June 10, 1996, p. 4 (hereafter cited as Benjes interview).

[134] Cole, Johnson, and Rayfield interview, p. 5.

[135] Madsen interview, p. 9. *See also* Mark C. Weber, *Special Education Law and Litigation Treatise* (Horsham, PA: LRP Publications, 1992), p. 3.33 ("The courts' somewhat limited use of Section 504 is not surprising. [*Board of Education v. Rowley*, 458 U.S. 176, 186 n. 6 (1982),] disapproved the lower courts' reliance on regulations promulgated under Section 504 to give meaning to the duty to provide appropriate education.").

[136] Cole, Johnson, and Rayfield interview, p. 5. *See also* Madsen interview, p. 9.

IDEA case law also may provide judicial affirmation of OCR's section 504 policies. For instance, although the U.S. Supreme Court's 1988 decision in *Honig v. Doe*[138] interpreted the Education of the Handicapped Act (EHA), now the IDEA, rather than section 504, the case, according to an OCR policy, "lends support to OCR's regulatory provision . . . [and] also supports OCR's longstanding policy of applying the regulatory provision regarding 'significant change in placement' to school disciplinary suspensions and expulsions of handicapped children."[139] Because OCR uses IDEA case law as guidance, OCR staff members generally remain aware of major cases decided under the IDEA.[140] In addition, OCR headquarters provides resource guidance materials on a variety of special education issues that discuss OCR's section 504 policies and IDEA case law related to the subject.

A violation of the IDEA, however, is not necessarily a violation of section 504. Although many times, an IDEA violation will also be a violation of section 504, compliance with section 504 must be determined on a case-by-case basis in accordance with requirements of the section 504 regulations. For example, under the IDEA, the failure to have a written IEP would be a violation, but under section 504 there may be no violation if the student is receiving an appropriate educational program that meets that student's educational needs and otherwise complies with other section 504 requirements.[141]

Proving Discrimination Under Section 504

OCR's standards for proving discrimination in public elementary and secondary education under section 504 involve an analysis based on the language of the statute. Section 504 presents three grounds on which a student identified as having a disability may claim a violation under its provisions. These grounds may be one or more of the following: (1) exclusion from participation in a federally assisted program or activity; (2) denial of the benefits of any federally assisted program or activity; or (3) discrimination under any federally assisted program or activity.[142]

OCR has developed a step-by-step process for identifying the presence of one or more of these claims in its analytical approach to enforcing section 504. OCR's first step is to determine whether the student has a disability under section 504. The section 504 regulations define a "handicapped person" as one who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record

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[137] Madsen interview, p. 9. Ms. Madsen noted as an example, "Like when a parent requests to change their kid's [sic] program, IDEA says you should meet within 10 days. We don't say if you meet on the 11th day . . . in 504 it says nothing about it. . . you were violating 504, but we would have the 10-day rule as a reasonable rule because it was under IDEA." Ibid., p. 9.

[138] 484 U.S. 305, 108 S.Ct. 592 (1988).

[139] LeGree S. Daniels, Assistant Secretary for Civil Rights, DOEd, memorandum to OCR Senior Staff, "Long-term Suspension or Expulsion of Handicapped Students," Oct. 28, 1988, p. 1. OCR noted the Supreme Court's opinion "reenforces several OCR policies: (1) permanent exclusion (expulsion) or indefinite suspension is a significant change in placement and illegal where the misconduct is caused by a handicap; and (2) suspension for more than 10 days is a significant change in placement." *See* LeGree S. Daniels, Assistant Secretary for Civil Rights, DOEd, memorandum to OCR Senior Staff, "Analysis of *Honig* v. *Doe*, . . . 56 U.S.L.W. 4091," Jan. 20, 1988, p. 6.

[140] Cavalli interview, p. 3.

[141] Ibid., p. 2.

[142] *See* 29 U.S.C. § 794(a) (1994). *See also* Judith Welch Wegner, "The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect To Handicap Under Section 504 Of The Rehabilitation Act of 1973," *Cornell Law Review* (vol. 69), pp. 401, 516 (1983–84) (hereafter cited as Wegner, "The Antidiscrimination Model Reconsidered"). Wegner recognizes three distinct types of cases and "alternative theories of litigation" arising under section 504: (1) "those involving exclusion (litigated under exclusionary criteria, exclusionary refusal to accommodate, and exclusionary judgment theories)"; (2) "those involving denials of benefits"; and "those involving discrimination (litigated under unequal treatment and unequal opportunity to benefit theories)." Wegner, "The Antidiscrimination Model Reconsidered," p. 516.

of such an impairment, or (iii) is regarded as having such an impairment.[143] OCR considers whether a student's situation or condition fits under this definition. It has recognized disabilities, such as learning disabilities, mental retardation, and emotional or mental illness, as covered under section 504.[144]

OCR's second step in proving discrimination is to consider whether the individual meets the definition of a "qualified handicapped person" based on the meaning provided in the section 504 regulations. In terms of public elementary and secondary education, OCR considers a student "qualified" using an "age appropriate" standard. Generally, as long as a student with a disability is of the same or similar age as nondisabled children and youth who are receiving educational services, the student with a disability is considered "qualified."[145]

OCR's final step in determining whether there has been a violation of section 504 requires an analysis of the facts in each case based on the presence of certain key elements required to make a finding of discrimination. In the context of elementary and secondary education, OCR's analytical approach to proving discrimination under section 504 is shaped by four basic concepts relating to discrimination theories: (1) free appropriate public education; (2) disparate treatment; (3) disparate impact; and (4) equal educational opportunity. In identifying theories that litigants have used to assert claims of discrimination under section 504, one author cites two theories for proving discrimination consistent with OCR's analytical approach: (1) unequal treatment and (2) unequal opportunity to benefit.[146] The former theory corresponds to disparate treatment while the latter theory, unequal opportunity to benefit, corresponds to the concepts of disparate impact and equal educational opportunity. The concept of a free appropriate public education reflects an overarching theme that incorporates all of the other concepts.[147]

The specificity of the section 504 regulation guides OCR's analytical approach to these concepts and its determination of whether a recipient has engaged in discriminatory actions.[148] Therefore, the section 504 regulation presents OCR's general criteria for proving discrimination under section 504. OCR's policies apply the section 504 regulation to specific issues.

The four concepts discussed below provide civil rights analyses that inform OCR's section 504 compliance activities in specific cases. While the theories of disparate impact and disparate treatment have played a more significant role in the Title VI setting, they nonetheless inform section 504 implementation, compliance, and enforcement because section 504, like Title VI, seeks to eliminate all forms of discrimination against persons with disabilities, particularly circumstances where individuals or groups of persons with disabilities are treated differently or do not receive the same benefits based on their having a disability. The importance of disparate treatment and disparate impact under section 504 has been noted by the Federal courts.[149] In addition, the historical disadvantages faced in this country by persons with disabilities[150] both individually and as a group place disparate treatment, disparate impact, and equal opportunity on a par with a "free appropriate public education" as means of understanding and addressing discrimination against persons with disabilities. However, the single most important concept from the specific perspective of disability rights under current Federal law is that of the "free appropriate public education."

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[143] 34 C.F.R. § 104.3(j) (1996).

[144] 34 C.F.R. § 104.3(j)(2)(i)(B) (1996).

[145] *See* 34 C.F.R. § 104.3(k)(2) (1996).

[146] Wegner, "The Antidiscrimination Model Reconsidered," p. 516.

[147] The denial of FAPE analysis can be based on disparate treatment or disparate impact theories of discrimination. *See* New Mexico Ass'n for Retarded Citizens v. State of New Mexico, 678 F.2d 847, 853–54 (10th Cir. 1982) (disparate impact) (The court of appeals for the Tenth Circuit relied on the U.S. Supreme Court case, Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), and other case authorities to note that "a federally-funded education system may be found in violation of section 504 where the entity's practices preclude the handicapped from obtaining system benefits realized by the non-handicapped." The court used two Title VI cases which applied a disparate effects test, Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), and Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974), as analogous illustrations of the section 504 analysis. Further, the court noted that it found "no language in the statute or regulations suggesting that proof of disparate treatment is essential to establishing a Section 504 infraction in connection with the educational rights of handicapped children." 678 F.2d at 854.). *See also* Begay v. Hodel, 730 F. Supp. 1001 (D. Ariz. 1990). However, one case arising in another judicial circuit implies that proof of intentional discrimination is necessary. *See* Georgia State Conference of Branches of NAACP v. State of Georgia, 775 F.2d 1403 (11th Cir. 1985).

[148] *See* 34 C.F.R. §§ 104.4, 104.33, and pt. 104, app. A, subpt. A (1996).

Free Appropriate Public Education

In determining whether a public elementary or secondary school recipient has engaged in discriminatory action against students with disabilities, OCR relies primarily on a determination of whether the recipient provided each student with a disability a free appropriate public education (FAPE).[151] A complaint alleging denial of FAPE is based on the section 504 provision on FAPE at 34 C.F.R. § 104.33(b) and the section 504 provisions prohibiting discrimination at 34 C.F.R. § 104.4(b)(1)(i)–(iv),(vii).[152]

OCR defines a free[153] appropriate education as "the provision of regular or special education and related aids and services that (i) are designed to meet the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36."[154] Under section 504, FAPE consists of regular or special education and related aids and services. Based on that definition, OCR considers several issues in determining whether an elementary or secondary school recipient has discriminated against a student with a disability:

(1) whether the education, aids, and services provided by the school meet the individual needs of the disabled student as adequately as the school meets the needs of nondisabled students;[155]
(2) whether the disabled student has been educated and provided nonacademic and extracurricular services in the least restrictive environment to the maximum extent appropriate to that student's needs;[156]
(3) whether facilities identified for disabled students and the services and activities provided in them are comparable to other facilities, services, and activities provided by the school;[157]

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[149] *See* n.145.

[150] *See* chap. 2.

[151] *See* 34 C.F.R. § 104.33(a) (1996) ("A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap."). *See also* Cole, Johnson, and Rayfield interview, p. 6 (There are generally two approaches to discrimination under section 504, a general approach and a section 504 FAPE approach.).

[152] Norma V. Cantú, Assistant Secretary for Civil Rights, OCR, DOEd, memorandum to All Staff, "Minority Students and Special Education," July 6, 1995, Policy Codification Document No. 00291, p. 41.

[153] The regulations specify that a free education is one "without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian." 34 C.F.R. § 104.33(c)(1) (1996). It may consist of either the provision of free services or payment for the costs of a program not operated by the recipient. *Id*

[154] 34 C.F.R. § 104.33(b)(1) (1996).

[155] *See* 34 C.F.R. § 104.33(b)(i) (1996).

[156] *See id.*, § 104.34(a)–(b) (1996).

[157] *See id.*, § 104.34(c) (1996).

(4) whether a school's evaluation of a student who is believed to need special education or related services, because of a disability, follows requisite procedures;[158]

(5) whether a school's actions in making placement decisions follows requisite procedures;[159] and

(6) whether a school has established and implemented certain procedural safeguards.[160]

Violation of the regulations underlying any one or more of these issues is a basis for OCR to determine that a school has denied a student with a disability a free appropriate public education and, thus, has discriminated against that student.[161] Because the definition of a free appropriate public education is based, in part, on adherence to certain section 504 procedures, many of the FAPE analyses for these six issues use a procedural approach. As a result, a finding that a school district has denied a student a free appropriate public education often involves a finding of a procedural violation. Because section 504 is written with an emphasis on procedures, denial of FAPE often means that there was something improper in the way a school district served the student in the identification, assessment, evaluation, or placement of the student, or in providing due process rights for the student's parent or guardian.[162]

OCR seems to have adopted a broad approach for defining discrimination when determining violations of section 504. Section 104.4 of the section 504 regulations contains the general language of section 504 prohibiting exclusion from participation in, denial of benefits of, or discrimination under a federally assisted program or activity on the basis of a disability, and it lists specific prohibited discriminatory actions.[163]

OCR's *Handbook for the Implementation of Section 504 of the Rehabilitation Act of 1973* states that "[s]ubpart A, Section [104.4] outlines actions that are prohibited by Section 504. The provisions of subparts B, C, D, E, and F are simply applications of these principles."[164] In addition, the handbook specifies that "a violation of a provision of Subparts B through F [of the section 504 regulations] will *always* be a violation of Section 84.4 [now section 104.4]."[165] If a violation of any provision contained in subparts B through F *requires* a violation of the antidiscrimination provision at section 104.4, then the coverage of section 104.4 includes the provision of a "free appropriate public education" defined at subpart D of the regulations.

Subpart D contains a requirement for the provision of a free appropriate public education *that includes* evaluation and placement of individuals, and procedural safeguards.[166] In defining the term "appropriate education," subpart D section 104.33(b)(1) states that:

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[158] *See id.*, § 104.35(a)–(b) (1996).

[159] *See id.*, § 104.35(a),(c) (1996).

[160] *See id.*, § 104.36 (1996).

[161] *See* DOEd, *OCR Handbook*, p. 81 (a violation of a provision of subpart D will always be a violation of the nondiscrimination provisions in subpart A, 34 C.F.R. § 104.4).

[162] *See* Madsen interview, p. 23 (Because section 504 is written with an emphasis on procedures, denial of FAPE means that there was something improper in the way a school district identified, evaluated, placed, or provided the parent due process rights in terms of how it served a student.). However, as the list above demonstrates, OCR's investigations involve more than simply determining if all of the proper forms have been completed.

[163] 34 C.F.R. § 104.4(a)–(b) (1996).

[164] *See* DOEd, *OCR Handbook*, p. 81.

[165] The provisions outlining the requirements for a free appropriate public education are in subpart D of the regulations, the subpart which is an application of the nondiscrimination principles in subpart A in the context of preschool, elementary, and secondary education. *See* DOEd, *OCR Handbook*, p. 44.

[166] 34 C.F.R. §§ 104.33, 104.34, 104.35, 104.36 (1996).

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> [f]or the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of § 104.34, 104.35, and 104.36.[167]

Sections 104.34, 104.35, and 104.36 address educational settings, including academic, and nonacademic settings, and comparable facilities (section 104.34); evaluation and placement (section 104.35); and procedural safeguards (section 104.36). Therefore, the section 504 regulations explicitly incorporate each of these requirements within the meaning of a "free appropriate public education" (FAPE).

OCR considers violations of subpart D as violations of the antidiscrimination provision at section 104.4. Therefore, the failure by a public school system to adhere to the FAPE provisions, including the evaluation and placement of individuals and procedural safeguards, constitutes discrimination under the section 504 regulations.[168] It is unclear, however, whether OCR uses this approach, as there are no policy documents or other materials which clarify the analysis.

OCR's section 504 regulations contain another provision identifying a second standard on which school districts may rely in meeting the requirement to provide a free appropriate public education to each student identified as having a disability. That provision is based on the IDEA requirement for an individualized education program. Under the second standard, "[i]mplementation of an individualized education program developed in accordance with the Education of the Handicapped Act [IDEA] is one means of meeting" the requirement for education and related aids and services designed to meet the individual educational needs of students identified as having disabilities as adequately as the needs of nondisabled students are met.[169] Because this provision relies on the standards set forth by Congress for compliance with the IDEA, its appropriateness as an OCR regulation under section 504 must be evaluated based on the meaning of a "free appropriate public education" under the IDEA.

Federal courts have attempted to guide school districts in providing a "free appropriate public education" by interpreting the IDEA, and by attempting to define what Congress meant by "appropriate" in developing educational programs for disabled students. In 1981 two cases attempted to address the level of services, or educational benefit, schools must provide to disabled students. The courts in *Springdale School District v. Grace*[170] and *Rettig v. Kent City School District*[171] determined that the term "appropriate" did not mean that schools were required to provide the "best" educational programs and resources available. The courts also held that a school district must individually tailor the educational program to meet that child's specific education needs.[172] In similar rulings addressing the development of IEPs, the courts held in *Campbell v. Talladega County Board of Education*[173] and in *Gladys J. v. Pearland Independent School District*,[174] that school districts must develop individualized education programs for students with disabilities to meet the needs of the student rather than those of the school district.[175]

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[167] 34 C.F.R. § 104.33(b) (1996).

[168] Some courts do not consider the denial of a free appropriate public education a basis for a finding of discrimination in violation of section 504. *See, e.g.*, Monahan v. Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982) (stating that a violation of section 504 must be based on something more than a mere failure to provide FAPE).

[169] 34 C.F.R. § 104.33(b)(2) (1996).

[170] 494 F. Supp. 266 (W.D. Ark. 1980).

[171] 539 F. Supp. 768.

[172] Allan G. Osborne, "Legal Standards for an Appropriate Education in the Post-*Rowley* Era," *Exceptional Children*, vol. 58, no. 6 (May 1992), pp. 488–97.

[173] 518 F. Supp. 47 (N.D. Ala. 1981).

[174] 520 F. Supp. 869 (S.D. Tex. 1981).

One of the first IDEA cases to be heard by the Supreme Court was *Board of Education of Hendrick Hudson Central School v. Rowley*.[176] That case addressed the level of services that a State must provide in order to meet the act's requirement of a "free appropriate education" and found that the requirement "is satisfied when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction."[177] The court held that the IEP must meet two criteria in order to be "appropriate" under IDEA: (1) the IEP must be developed in accordance with the procedures set forth in IDEA, including those governing resolution of disputes between parents and school systems; and (2) the IEP must be "reasonably calculated to enable the child to receive educational benefits."[178] This Supreme Court ruling introduced another controversy in semantics by not clearly defining "some" educational benefit.[179]

The landmark decision in *Rowley* was instrumental in advancing the rights of students with disabilities in education, but *Rowley* did not provide schools with a clearer definition of "appropriate." Moreover, proponents of education for disabled students criticized the ruling because it "established a precedent for providing disabled students with only a basic floor of opportunity rather than a level of services that would allow them to receive an equal educational opportunity."[180] That basic floor of opportunity, many feared, would result in schools providing only minimal services to students identified as having disabilities.

David D. v. Darmouth School Committee established the "maximum" educational benefit standard in the education of students with disabilities.[181] The standard simply states that a State can establish, by law, special education goals or standards higher than those established by the IDEA. For instance, if a State were to require its schools to maximize the educational potential of students with disabilities, courts would enforce those standards and require schools to develop educational programs to maximize the potential of disabled students.[182]

The ambiguity left by the courts in interpreting what Congress meant by "appropriate" education, and the vague language of the statute itself, have led to several different and distinct interpretations. The most common interpretations revolve around specifying the level of services provided to students with disabilities and defining educational benefit. Some interpret the law to mean that school districts should provide minimal educational services to students with disabilities, while others interpret the language to mean that schools must maximize the learning potential of such students.

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[175] *Id.*

[176] 458 U.S. 176 (1982).

[177] 458 U.S. 176, 202 (1982); *see also* Osborne, "Legal Standards for an Appropriate Education," pp. 488–97.

[178] 458 U.S. at 206–207; *see also* Eileen L. Ordover and Kathleen B. Boundy, *Educational Rights of Children with Disabilities: A Primer for Advocates* (Cambridge, MA: Center For Law Education, 1991), p. 10 (citing *Board of Ed. v. Rowley*, 458 U.S. 176).

[179] Osborne, "Legal Standards for an Appropriate Education," pp. 488–97. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the court held that while the Education for All Handicapped Children Act of 1975 (now the IDEA) requires States receiving funds under the act to provide personalized instruction for handicapped children, it does not require them to provide services that will allow the child to attain maximum potential.
The "some" educational benefit ruling in *Rowley* initiated controversy of the level of services provided to disabled students and a definition of the educational benefit. The decision made it clear that advancing to a higher grade was not an adequate measure of educational benefit and that each student should be measured on a case by case basis.

[180] Osborne, "Legal Standards for an Appropriate Education," pp. 488–97.

[181] 775 F.2d 411 (1st Cir. 1985).

[182] H. Rutherford Turnbull III, *Free Appropriate Public Education: The Law and Children with Disabilities* (4th ed. 1993), p. 137.

OCR has clarified that an equally effective opportunity is intended to encompass the notion of equivalent, as opposed to identical, services. It also is intended to acknowledge the fact that, to meet the individual needs of persons with disabilities to the same extent that the corresponding needs of nondisabled persons are met, adjustments to the regular programs or the provision of different programs may sometimes be necessary.[183] Thus, in providing a free appropriate public education, elementary and secondary schools may have to provide or finance special services or make adjustments to existing programs as is necessary to meet the individual educational needs of each qualified student with a disability.[184]

Disparate Treatment

Using a disparate treatment analysis, OCR may consider whether a school district treated a student with a disability differently because of his or her disability and whether that treatment was necessary to providing the student with equally effective aids, benefits, or services. The different treatment may occur in many ways:

- denying a "qualified handicapped person an opportunity to participate in or benefit from an aid, benefit, or service" provided by that recipient,[185]
- providing different or separate aid, benefits, or services;[186]
- denying a "qualified handicapped person the opportunity to participate as a member of planning or advisory boards;"[187] or
- limiting a "qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others."[188]

If the different treatment is found to be solely because of the person's disability, it will not necessarily constitute discrimination. If a school has a legitimate reason for taking action because of the disability, different treatment is permissible. For example, different treatment may be necessary to provide the student with aid, benefits, or services in a nondiscriminatory manner and to afford the student an equal educational opportunity.[189]

Disparate Impact

Using a disparate impact analysis, OCR also may consider whether the school actually provided an equally effective education. In the context of elementary and secondary education, under the disparate impact analysis, OCR considers whether a neutral policy, criterion, practice, or procedure has an adverse impact on students with disabilities. If so, the school district must provide a justification for its practice demonstrating that it is educationally necessary.[190] The complaining party may still prevail by demonstrating that a less discriminatory alternative practice is available. Disparate impact cases may appear in several ways. The school or State education agency may be using criteria or methods of administration that have the effect of subjecting a "qualified handicapped" student to discrimination.[191] The student may be:

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[183] 34 C.F.R. pt. 104, app. A, subpt. A (1996). *See also* DOEd, *OCR Handbook*, p. 85.

[184] *See* 34 C.F.R. § 104.33(b)(1) (1996) ("For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meed the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met. . .").

[185] 34 C.F.R. § 104.4(b)(1)(i) (1996).

[186] *Id.*, § 104.4(b)(iv) (1996).

[187] *Id.*, § 104.4(b)(vi) (1996).

[188] *Id.*, § 104.4(b)(1)(vii) (1996). *See also* DOEd, *OCR Handbook*, p. 93 (Section [104.4(b)(1)(vii)] also implements a basic objective of section 504: "that handicapped persons be free to lead independent and self-sufficient lives, to the maximum extent possible.").

[189] *See* 34 C.F.R. § 104.4(b)(iv) (1996) (Recipients are prohibited from providing different or separate aid, benefits, or services to persons with disabilities unless such action is necessary to provide a qualified person with a disability with aid, benefits, or services that are as effective as those provided to others.).

- denied an opportunity to participate in a class, program, service, or activity;[192]
- afforded an education that is not equal nor as effective as that provided to others;[193] or
- limited in the enjoyment of a right, privilege, advantage, or opportunity enjoyed by others.[194]

Depending on the circumstances of a given case, OCR may apply a disparate treatment, disparate impact, or a free appropriate public education (FAPE) analysis in determining whether a school's action constitutes discrimination. OCR's analyses largely are guided by the nondiscrimination and FAPE provisions in the section 504 regulations.

Equal Educational Opportunity

In implementing section 504 and defining what constitutes discrimination, OCR has worked with an overall purpose to promote equal educational opportunity for students with disabilities. OCR's handbook outlines four "fundamental principles inherent in the concept of 'equal opportunity' for qualified handicapped persons":

- Self-sufficiency;
- Freedom from exclusion or denial of benefits simply because of the existence of a handicap;
- Provision of aids, benefits, and services that are *as effective* as those provided to others; and
- Provision of aids, benefits, and services with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person.[195]

In developing section 504 regulations, OCR has implemented these four principles taking both a reactive and proactive approach to defining discrimination under section 504.[196]

OCR's reactive approach to defining discrimination encompasses provisions that prohibit a recipient from taking certain action. The provisions largely resemble those in OCR's Title VI and Title IX regulations that specify prohibited discriminatory conduct.[197] For example, the section

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190 *See, e.g.*, New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982).

[191] 34 C.F.R. § 104.4(b)(4) (1996).

[192] *Id.*, § 104.4(b)(1)(i) (1996).

[193] *Id.*, § 104.4(b)(1)(ii)-(iii) (1996). The section 504 regulations clarify that "to be equally effective, [the aids, benefits, and services] are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs." 34 C.F.R. § 104.4(b)(2).

[194] 34 C.F.R. § 104.4(b)(1)(vii) (1996).

[195] DOEd, *OCR Handbook*, p. 21.

[196] *See* Benjes interview, p. 9 (noting that section 504 and the ADA have a fundamental proactive base).

[197] *See, e.g.*, 34 C.F.R. § 104.4(b)(1)(i)–(ii) (1996) (section 504) (prohibits denying a qualified person with a disability the opportunity to participate in or benefit from the aid, benefit, or service and affording a qualified person with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others); *id.* § 100.3(b)(vi) (Title VI) (prohibits denying an individual an opportunity to participate in the program through the provision of services or otherwise of affording him an opportunity to do so which is different from that afforded others under the program); *id.* § 106.31(b)(3) (Title IX) (prohibits denying any person any such aid, benefit, or service). *See also id.* § 104.4(b)(1)(iv) (section 504) (prohibits the provision of different or separate aid, benefits, or services to persons with disabilities or to any class of persons with disabilities); *id.* § 100.3(b)(1)(ii) (Title VI) (prohibits providing any service,

504 regulations prohibit a recipient from denying a qualified person with a disability the opportunity to participate in or benefit from an aid, benefit, or service provided by the recipient,[198] thus ensuring the principle of freedom from exclusion or denial simply because of a disability.[199] OCR also has implemented the principle of self-sufficiency in its reactive nondiscrimination provisions. Section 504 regulations prohibit a recipient from "[o]therwise limit[ing] a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service."[200]

OCR's proactive approach to defining discrimination incorporates provisions that, like the reactive provisions, prohibit recipients from taking certain action but that also may require recipients to take certain action because refusal to do so is discriminatory. These provisions implement the third and fourth principles of equal educational opportunity, the provision of aids, benefits, and services that are *as effective* as those provided to others and the provision of aids, benefits, and services with nondisabled persons to the maximum extent appropriate to the needs of the person with a disability. Specifically, the section 504 regulations prohibit recipients from providing a qualified person with a disability an aid, benefit, or service that is not as effective as that provided to others.[201] To ensure the provision of an equally effective opportunity, the section 504 regulations require public elementary and secondary schools to provide a free appropriate public education to qualified persons with disabilities.[202] Failure to provide this education violates the nondiscrimination provisions of the section 504 regulations.[203]

The proactive nondiscrimination provisions of the section 504 regulations are distinct from and much broader than affirmative provisions under Title VI and Title IX.[204] The section 504 regulations do contain remedial and voluntary action

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financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program); *id.* § 106.31(b)(2) (Title IX) (prohibits providing different aid, benefits, or services or provide aid, benefits, or services in a different manner); *id.* § 104.4(b)(1)(v) (section 504) (prohibits the aiding or perpetuation of discrimination against a qualified person with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the recipients program); *id.* § 106.31(b)(6) (1996) (Title IX) (prohibits aiding or perpetuating discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees).

[198] 34 C.F.R. § 104.4(b)(1)(i) (1996).

[199] Of this principle, OCR's handbook notes, "Eliminating gross exclusions and denials of aids, benefits, and services is necessary to ensure genuine equal opportunity. Recipients must discontinue making decisions based on stereotypes and presumptions concerning the needs and abilities of each qualified individual who happens to also have a handicap." DOEd, *OCR Handbook*, p. 22 (citing Preamble, 42 Fed. Reg. 22,676, col. 2 (May 4, 1977).

[200] 34 C.F.R. § 104.4(b)(1)(vii) (1996). *See also* DOEd, *OCR Handbook*, p. 93 (Section [104.4(b)(1)(vii)] also implements a basic objective of Section 504: that persons with disabilities be free to lead independent and self-sufficient lives, to the maximum extent possible.").

[201] 34 C.F.R. § 104.4(b)(1)(iii) (1996).

[202] 34 C.F.R. § 104.33(a) (1996). OCR's 1981 handbook notes, "'Effective opportunity' is addressed in each Subpart of the Regulations . . . Subpart D includes a provision requiring an appropriate education." DOEd, *OCR Handbook*, p. 86. *See also* Cole, Johnson, and Rayfield interview, p. 6 (Under section 504 FAPE analysis as a theory of discrimination, "[g]enerally we approach it as the district under it has an affirmative obligation to do certain things.").

[203] DOEd, *OCR Handbook*, p. 81 (a violation of a provision of subpart D will always be a violation of the nondiscrimination provisions in subpart A, 34 C.F.R. § 104.4). *See* pp. 30–36 above. *See also* Madsen interview, p. 23 (denial of FAPE equals denial of equal educational opportunity).

[204] The Title VI regulations specify that recipients "must take affirmative action to overcome the effects of prior discrimination." 34 C.F.R. § 100.3(b)(6)(i) (1996). In the absence of prior discrimination, there is no requirement for affirmative action; recipients "may take affirmative action to overcome the effects of conditions which resulted in limiting participation of a

provisions similar to those of Title VI and Title IX.[205] These provisions, however, are separate and distinct from the proactive provisions defining prohibited discrimination actions.

Legal challenges under section 504 have raised questions about the breadth of the section 504 nondiscrimination provisions in imposing obligations on recipients of Federal financial assistance and the extent of DOEd's authority to create such obligations. In *Southeastern Community College v. Davis*,[206] the U.S. Supreme Court noted: "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW [DOEd] has attempted to create such an obligation itself, it lacks the authority to do so."[207] Because the case involved postsecondary education and the section 504 regulation provisions on postsecondary education, the legal interpretations in the case do not apply to the section 504 regulations regarding FAPE at the elementary and secondary school level. At the elementary and secondary school level the only eligibility requirement to participation in the educational program is age. In a policy letter discussing the case, OCR noted that "the Court was addressing modifications unrelated to the part of the educational process covered by 34 C.F.R. § 104.33" on elementary and secondary education.[208]

FAPE as a Cause of Action Under Section 504

The IDEA makes clear in its statutory language that individuals may bring a civil action in court under the IDEA for matters relating to the identification, evaluation, or educational place-

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particular race, color, or national origin." *Id.* § 100.3(b)(6)(ii). The provisions on affirmative action in the Title IX regulations are similar. *See id.* § 106.3(a) ("If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination."); *id.* § 106.3(b) ("In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex.").

[205] *See* 34 C.F.R. § 104.6(a)–(b) (1996).

[206] 442 U.S. 397, 99 S.Ct. 2361 (1979).

[207] 442 U.S. at 411–12, 99 S.Ct. at 2369–70. *Southeastern Community College* was a postsecondary education case in which a woman with a serious hearing disability sought admission to an associate degree nursing program. The Court considered whether the physical qualification of hearing as a criterion for admission into the program and the school's refusal to admit the hearing impaired applicant based on that criterion violated section 504. The Court held that there was no violation of section 504 because (1) the applicant was not qualified for admission, (2) section 504 does not prohibit a school from requiring reasonable physical qualifications for admission, and (3) that modifications to the admission criteria necessary to accommodate the applicant would lower or effect substantial modification of standards as to make them unreasonable. *Id.* The Court discussed § 104.3(k)(3), defining "qualified handicapped person" with respect to postsecondary and vocational education services, and § 104.44(d)(2) in subpart E on postsecondary education, in the section 504 regulations. *Id.* at 406, 409.

[208] *See* Norma V. Cantú, Assistant Secretary for Civil Rights, DOEd, letter to Perry A. Zirkel, College of Education, Lehigh University, Aug. 28, 1993, p. 3; *see also* Southeastern Community College v. Davis, 442 U.S. 397, 411, 99 S.Ct. 2361, 2369, 60 L.Ed.2d 980 (1979) ("neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds"); Monahan v. State of Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982) ("The Rehabilitation Act, on the other hand, is . . . narrower than [IDEA] . . . It is narrower in that it is not, generally speaking, an affirmative-action statute . . . Section 504, instead, is simply a prohibition of certain conduct on the part of recipients of federal financial assistance."). In fact, the U.S. Supreme Court in *Southeastern Community College* validated the section 504 proactive provisions defining prohibited discriminatory action as well as DOEd's authority to create such provisions. *See* 442 U.S. at 412–13 ("situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of [DOEd]."). *See also* New Mexico Ass'n for Retarded Citizens v. State of New Mexico, 678 F.2d 847, 853–54 (10th Cir. 1982) ("it is reasonable to conclude that refusal to accommodate a handicapped student in an educational program may constitute discrimination if the student could thereby realize and enjoy the program's benefits").

ment of a child or the provision of a free appropriate public education to a child after administrative due process procedures are exhausted.[209] Although the statutory language of section 504 makes no mention of the right of individuals to bring a civil action, the U.S. Supreme Court has interpreted section 504 to permit a private right of action in several contexts, including employment,[210] higher education,[211] and elementary and secondary education.[212] Moreover, the Supreme Court has permitted private civil actions under both Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments Act of 1972 without expressly deciding if a private right of action exists.[213]

The language in section 504 specifies that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination" under any federally assisted or federally conducted program or activity.[214] Although the language clearly *prohibits* certain action, the extent to which the language *requires* certain action is less clear. In the context of higher education, the U.S. Supreme Court noted in *Southeastern Community College v. Davis* that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory,"[215] but it clarified that "Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."[216] For elementary and secondary education cases, the Supreme Court has yet to rule on the extent to which section 504 guarantees a free appropriate public education.[217]

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[209] *See* Pub. L. No. 105–17, § 615(i)(2)(A) (1997) ("Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy."). Under § 615(a) & (b)(1), any State educational agency, any local educational agency, and any intermediate educational unit which receives IDEA Part B funds shall establish and maintain procedures such that there is an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education to such child. *Id.* at § 615(b)(1) (1997). Whenever such complaints have been received, "the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." *Id.* at § 615(f)(1). Section 615(g) provides that "any party aggrieved by the findings and decision rendered in a hearing may appeal to the State educational agency. Such agency shall conduct an impartial review of such hearing." *Id.* at § 615(g).).

[210] *See* Consolidated Rail Corp. v. Le Strange, 465 U.S. 624, 104 S.Ct. 1248, 79 L.Ed.2d 568 (1984).

[211] *See* Pushkin v. Regents of the University of Colorado, 658 F.2d 1372 (10th Cir. 1981).

[212] *See* Smith v. Robinson, 468 U.S. 992 (1984); Helms v. McDaniel, 657 F.2d 800, 806 n.10 (5th Cir. 1981) ("The lower court found a private right of action under section 504 on the authority of Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980). *Camenisch* has since been vacated as moot. University of Texas v. Camenisch, 451 U.S. 390 (1981). In vacating, however, the Supreme Court did not question the correctness of this court's holding on the private right of action issue, and indeed ordered the case remanded to the district court for a judgment on the merits. We conclude that this aspect of *Camenisch* is still good law in this circuit. Brown v. Sibley, 650 F.2d 760, 767 n.9 (5th Cir. 1981) ("We therefore are disposed, for the limited purpose of our disposition in this case, to assume the existence of such a right [of private cause of action under § 504]")."); Sanders by Sanders v. Marquette Pub. Sch., 561 F. Supp. 1361, 1369 (W.D. Mich. 1983) (noting that "under the *Cort v. Ash* analysis, a cause of action may be implied under the Rehabilitation Act"). *See also* New Mexico Ass'n for Retarded Citizens v. State of New Mexico, 678 F.2d 847, 854 (10th Cir. 1982) (finding that a cause of action may be implied under section 504); Stauffer v. Orangeville Sch. Dist., 1990 U.S. Dist. LEXIS 19133 (May 17, 1990). *But, see,* Howell by Howell v. Waterford Public Schools, 731 F. Supp. 1314 (E.D. Mich. 1990); Garland Independent School District v. Wilks, 657 F. Supp. 1163 (N.D. Tex. 1987); Sanders by Sanders v. Marquette Public Schools, 561 F. Supp. 1361 (W.D. Mich. 1983); Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982).

[213] *See* Lau v. Nichols, 414 U.S. 563 (1974); University of California Board of Regents v. Bakke, 438 U.S. 265 (1978); and Cannon v. University of Chicago, 441 U.S. 677 (1979). Section 794a of the Rehabilitation Act does specify that the remedies, procedures, and rights available under Title VI of the Civil Rights Act of 1964 shall be available. *See* 29 U.S.C. § 794a (1994); 42 U.S.C. § 2000d (1994).

[214] *See* 29 U.S.C. § 794(a) (1994).

At least two lower courts have addressed some aspects of the issue. In *Sanders by Sanders v. Marquette Public Schools*,[218] the plaintiff claimed that, if not for the student's disabilities, her education would have been "appropriate" and that the student's disabilities made certain measures necessary to afford an appropriate education. The court agreed noting, "These circumstances seem as clearly within the province of the Act [section 504]. . ."[219] In *Students of California School for the Blind v. Honig*,[220] the court found that the section 504 regulation at 34 C.F.R. § 84.34(c) (now § 104.34(c)), a provision requiring comparable facilities, was a valid interpretation of section 504. That court noted, "Because § 504 forbids discrimination in federally funded programs, a regulation requiring comparable facilities seems to be a logical and valid interpretation of that statute."[221]

The section 504 regulations list specific requirements on (1) the identification, evaluation, and placement of persons with disabilities in public elementary and secondary schools,[222] (2) procedural safeguards with respect to such actions,[223] and (3) the provision of a free appropriate public education.[224] The regulations "set forth requirements for nondiscrimination in preschool, elementary, secondary, and adult education programs and activities, including secondary vocational education programs."[225] The requirements generally conform to the standards established in the IDEA.[226] Because of the similarity in requirements of the section 504 regulations and the IDEA, cases that have involved identification, evaluation, placement, procedural safeguards, or the provision of FAPE have been brought under both the IDEA and section 504.[227]

There is continued disagreement among the lower Federal courts in interpreting section 504

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[215] Southeastern Comm. College v. Davis, 442 U.S. 397, 412, 413 (1979).

[216] 442 U.S. at 413.

[217] *See* Smith v. Robinson, 468 U.S. 992, 1019, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984) ("We need not decide the extent of the guarantee of a free appropriate public education Congress intended to impose under § 504.").

[218] 561 F. Supp. 1361 (W.D. Mich. 1983).

[219] 561 F. Supp. at 1372.

[220] 736 F.2d 538, 546 (9th Cir. 1984), *reprinted in* 1984–85 EHLR DEC. 556:110.

[221] 1984–85 EHLR DEC. 556:114–15.

[222] *See* 34 C.F.R. §§ 104.32, 104.34, 104.35 (1996).

[223] *See id.*, § 104.36 (1996).

[224] *See id.*, § 104.33(a) (1996).

[225] 34 C.F.R. pt. 104, app. A, subpt. D (1996). There are, however, no FAPE requirements governing preschool and adult educational programs.

[226] 34 C.F.R. pt. 104, app. A, subpt. D (1996) (Subpart D "generally conforms to the standards established for the education of handicapped persons in Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972), Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 344 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and Lebanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Pub. L. 94–142 (EHA).").

[227] *See* Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984); Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981); Sanders by Sanders v. Marquette Pub. Sch., 561 F. Supp. 1361 (W.D. Mich. 1983). If a party brings claims under both IDEA and section 504, the weight of authority has concluded that exhaustion of administrative remedies under IDEA is required before the case can go forward.

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and whether FAPE claims state a valid cause of action. The disagreement centers, in part, on determining when the failure to properly identify, evaluate, or place an individual, to provide procedural safeguards, or to provide a free appropriate public education amounts to discrimination under section 504. Several lower courts have interpreted section 504 broadly and have recognized claims related to the provision of a free appropriate public education, absent proof of intentional discrimination. They have considered the failure to properly evaluate a student or to provide certain services as sufficient cause to state a claim of discrimination under section 504. For example, in *Sanders by Sanders v. Marquette Public Schools*,[228] the court adopted the rationale that when a failure to assess properly and accommodate a person with a disability denies him or her the benefit of measures that would make the education appropriate, there is a valid cause of action under section 504.[229] The court interpreted this circumstance as presenting the element of discrimination or exclusion "on account of" disability.[230] Relying on *Sanders*, the court in *Howell by Howell v. Waterford Public Schools*[231] held that allegations that the plaintiff "is not being provided the proper *amount* of therapy nor provided therapy in the proper *manner* state an actionable § 504 claim."[232]

Other courts, however, have interpreted the nondiscrimination provision of section 504 to require more than a failure to provide FAPE through a failure to evaluate correctly or a faulty educational plan in order to establish a cause of action under section 504. They have required proof of intentional discrimination. For example, in *Monahan v. Nebraska*,[233] the Court of Appeals for the Eighth Circuit stated that "in order to show a violation of the Rehabilitation Act, something more than a mere failure to provide the 'free appropriate public education' required by EAHCA must be shown. . . . The reference in the Rehabilitation Act to 'discrimination' must require, we think, something more than an incorrect evaluation, or a substantively faulty individualized education plan, in order for liability to exist."[234] Similarly, the court in *Garland Independent School District v. Wilks*[235] stated that "[s]o long as a good faith effort was made to formulate a proper IEP . . . the fact that there may have been misjudgment on the part of the [evaluation] Committee or the school board will not trigger recovery of damages, whether under the EAHCA, or under § 504 as made available pursuant to the Handicapped Children's Act of 1986."[236] Referencing *Monahan*, the court added that to "impose damage liability on the school district in this case would be tantamount to imposing educational malpractice liability . . . This is not the problem § 504 is intended to address."[237]

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[228] 561 F. Supp. 1361 (W.D. Mich. 1983).

[229] 561 F. Supp. 1361, 1370–72 (W.D. Mich. 1983). The issue before the court was whether the defendants' motion for summary judgment should be granted. In ruling on the motion, the court determined whether the plaintiffs had alleged the elements of a cause of action under section 504. One of the elements that the plaintiff had to show was that she was discriminated against on the basis of her disability. *Id.* at 1370. The court stated that "[a]lleging that a proper learning program was or could have been available presents one factor of this element." *Id.* at 1371. The plaintiff claimed that, "but for her disabilities, the education Louise received would have been 'appropriate' within the meaning of the Act . . . [that] Her disabilities allegedly made other measures 'appropriate' . . . Consequently, defendants' alleged failure properly to assess and accommodate Louise's disabilities denied her the benefit of measures that would have made her education 'appropriate.'" In responding to this analysis, the court wrote, "These circumstances seem as clearly within the province of the Act as those presented when a handicapped person seeks access to a program that is not designed to alleviate learning disabilities. *Cf.*, Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979)." *Id.* at 1372.

[230] 561 F. Supp. at 1371–72.

[231] 731 F. Supp. 1314 (E.D. Mich. 1990).

[232] *Id.* at 1319 (emphasis in original). In *Howell*, the defendants sought to have the case dismissed because the plaintiff's complaint omitted allegations of "bad faith" or "gross misjudgment" in claiming a violation of section 504. 731 F. Supp. at 1318. The court determined that such allegations were not necessary to state a cause of action under section 504.

[233] 687 F.2d 1164 (8th Cir. 1982).

[234] *Id.* at 1170. The principal issue in *Monahan* was whether the Nebraska statutory procedure for administrative appeals from placement decisions made by school officials was valid under the Education for All Handicapped Children Act (now the IDEA), section 504, and 42 U.S.C. § 1983. *Id.* at 1167. The court stated that "either bad faith or gross misjudgment should be shown before a § 504 violation can be made out, at least in the context of education of handicapped children." *Id.* at 1171.

[235] 657 F. Supp. at 1163 (N.D. Tex. 1987).

Two cases decided by the U.S. Supreme Court[238] have raised questions of the extent to which an individual could bring an action under section 504 for matters relating to the provision of a free appropriate public education. *Board of Education of the Hendrick Hudson Central School District v. Rowley*[239] involved a claim brought under the IDEA. Although the Court was not addressing an action brought under section 504, the Court in that case noted disapproval of the lower court's reliance on the section 504 regulations to define an "appropriate education."[240] In finding that the IDEA itself and its legislative history provide sufficient guidance to courts and hearing officers on Congressional intent as to the substantive meaning of the term "free appropriate education," the Court stated that:

> For reasons that are not revealed in the record, the District Court concluded that "[the] Act itself does not define 'appropriate education.'" 483 F. Supp., at 533. In fact, the Act expressly defines the phrase "free appropriate public education," see § 1401(18), to which the District Court was referring. See 483 F.Supp., at 533. After overlooking the statutory definition, the District Court sought guidance not from regulations interpreting the Act, but from regulations promulgated under § 504 of the Rehabilitation Act.[241]

The Court further signaled its disapproval of a coextensive substantive interpretation of the two statutes. In *Smith v. Robinson*,[242] the central issue before the Court was whether attorney's fees could be obtained under the Rehabilitation Act for a claim asserted under section 504, when the EHA (now the IDEA) also was available to provide relief for the claim. In its analysis, the Court drew a distinction between the substantive right to a free appropriate public education under the EHA and the protections against discrimination under section 504.[243] The Court noted that "both statutes are built around fundamental notions of equal access to state programs and facilities" and that "the rights of a handicapped child to a public education, have been interpreted to be strikingly similar."[244] In outlining the distinction, the Court wrote, "it does not follow that the affirmative requirements imposed by the two statutes are the same. The significant difference between the two, as applied to special education claims, is that the substantive and procedural rights assumed to be guaranteed by both statutes are specifically required only by the [IDEA]."[245] The Court, however, chose to refrain from deciding "the extent of the guarantee of a free appropriate public education that Congress intended to impose under § 504."[246] The Court found that where the EHA is available to enforce substantive rights and section 504 adds nothing to those substantive rights, a plaintiff could not "circumvent or enlarge on the remedies available under the EHA [now IDEA] by resort to § 504."[247] Although neither the *Rowley* case nor the *Smith* case completely foreclosed the right to file an action under section 504 in elementary and secondary education cases, the Court's decision in *Smith* left an impression that no relief would be available under section 504 if relief was available under the EHA for matters relating to the provision of a free appropriate public education.[248]

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[236] *Id.* at 1169. In *Garland*, the defendant, Mrs. Wilks, filed her own claim against the plaintiff alleging that its failure to supplement her son's IEP with educational services after regular school hours and during the summer violated section 504. 657 F. Supp. at 1164, 1168.

[237] *Id.* at 1169. *But cf.* Howell by Howell v. Waterford Pub. Sch., 731 F. Supp. 1314, 1318 (stating that the language in *Monahan* requiring "bad faith" or "gross misjudgment" for a valid claim under section 504 is similar to language in *Smith v. Robinson* and that, since Congress expressly overruled *Smith* with the Handicapped Children's Protection Act of 1986, "this Court is not inclined to give [*Monahan*] the authoritative reading defendants do.").

[238] Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 103 S.Ct. 3034, 458 U.S. 176, 73 L.Ed.2d 690 (1982), and Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984).

[239] 103 S.Ct. 3034, 458 U.S. 176, 73 L.Ed.2d 690 (1982).

[240] *See* 458 U.S. at 186 n.8.

[241] *Id.*, citing 483 F. Supp. 128, 133 (S.D. N.Y. 1980).

[242] 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984).

[243] "Section 504 and the EHA are different substantive statutes. While the EHA guarantees a right to a free appropriate public education, § 504 simply prevents discrimination on the basis of handicap." 468 U.S. at 1016.

[244] *Id.* at 1017.

To clarify the effect of the EHA on rights, procedures, and remedies available under section 504 and other laws, Congress enacted the Handicapped Children's Protection Act of 1986.[249] The act amended the EHA to recognize that the EHA should not be interpreted as restricting or limiting the rights, procedures, and remedies available under the Constitution, section 504, or other Federal statutes protecting the rights of children and youths with disabilities. The act required that before filing a civil action under those other laws, a party would have to exhaust the same administrative remedies required under the EHA if that party sought relief also available under the EHA such as a free appropriate public education.[250] The act also amended the EHA to authorize the award of reasonable attorneys' fee to certain prevailing parties.[251]

Through the act, Congress clarified its intent to recognize a private right to bring a civil action under section 504, for claims relating to the education of children and youth with disabilities.[252] The legislative history of the 1986 statute indicates that Congress intended these amendments to accomplish at least two objectives. First, Congress sought to clarify its intent "with respect to the educational rights of handicapped children guaranteed by the EHA."[253] Second, Congress sought to ensure that the EHA did not limit the applicability of other laws, such as section 504, in protecting the educational rights of students with disabilities.[254] After the passage of the EHA amendments, it appears that individuals may file an action in court under section 504 for claims that also could be raised under the IDEA (i.e., the failure to properly identify, evaluate, or place a student or the failure to provide a free appropriate public education). Because *Garland Independent School District v. Wilks*[255] was decided after passage of the EHA amendments, at least one court decision poses lingering questions on the issue. Consequently, there remains some confusion on the types of FAPE claims that state a valid cause of action under section 504 and the legal standards courts apply to such claims.

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[245] *Id.* at 1018.

[246] *Id.* at 1019.

[247] *Id.* at 1021. The Court, however, clarified the narrowness of its holding. It was not addressing "a situation where the EHA is not available or where § 504 guarantees substantive rights greater than those available under the EHA." *Id.* Further, the Court expressly noted that it was not deciding "the extent of the guarantee of a free appropriate public education Congress intended to impose under § 504." *Id.* at 1019.

[248] *See* S. Rep. No. 112, 99th Cong., 2d Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1799. The report notes that the effect of the Supreme Court's decision in *Smith v. Robinson* "was to preclude parents from bringing special education cases under section 504 of the Rehabilitation Act of 1973, and recovering attorney's fees available under section 505 of that act, where relief was available under the EHA." *Id.* at 3, *reprinted in* 1986 U.S.C.C.A.N. 1799. *See also* Judith Welch Wegner, "Educational Rights of Handicapped Children: Three Federal Statutes and an Evolving Jurisprudence, Part II: Future Rights and Remedies," *Journal of Law & Education* (vol. 17), pp. 625, 635 (Fall 1988) ("reliance upon section 504 in special education litigation has sharply diminished in recent years as a result of the Supreme Court's *Smith* decision . . ."); Weber, *Special Education Law and Litigation Treatise*, p. 3:33 ("*Smith* held that because the [IDEA] preempts other substantive statutory and constitutional requirements for educating children with disabilities, attorneys' fees are not available under the Civil Rights Attorneys Fees Act of 1976 or section 504 of the Rehabilitation Act of 1973. The broad preemption reasoning left little room to argue that a claim for relief under section 504 could afford greater relief in the form of a better placement or educational services than could a claim under the Education of the Handicapped Act.").

[249] Pub. L. No. 99–372, 100 Stat. 796.

[250] Pub. L. No. 99–372, § 3, 100 Stat. 796, 797.

[251] *See* Pub. L. No. 99–372, § 2, 100 Stat. 796, 796.

[252] According to the Senate Report accompanying S. 415, "Congress' original intent was that due process procedures, including the right to litigation if that became necessary, be available to all parents." S. Rep. No. 112, 99th Cong., 2d Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1799.

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[253] S. Rep. No. 112, 99th Cong., 2d Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1799.

[254] S. Rep. No. 112, 99th Cong., 2d Sess. 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1800. Proposed amendments to the bill did not affect this section. S. Rep. No. 112, 99th Cong., 2d Sess. 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1802–05. The House Conference Report notes that "both the Senate bill and the House amendment authorize the filing of civil actions under legal authorities other than part B of EHA so long as parents first exhaust administrative remedies available under part B of EHA to the same extent as would be required under that part," although with slightly different wording. The House receded to the Senate's version. H.R. Rep. No. 687, 99th Cong., 2d Sess. 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1809. *See also* Wegner, "Educational Rights of Handicapped Children," p. 457 ("In effect, therefore, Congress made plain that [statutory] interrelation should no longer be an issue where a cause of action has been stated under a separate statute signalling that legally independent claims should henceforth be allowed."); Weber, *Special Education Law and Litigation Treatise*, p. 21:18 ("The Handicapped Children's Protection Act reaffirms the availability of section 504 of the Rehabilitation Act of 1973 as a cause of action in special education cases.").

[255] 657 F. Supp. 1163 (N.D. Tex. 1987). *See* pp. 47–48 above for a discussion of this case.

Chapter 5

Using Neutral and Nondiscriminatory Diagnostic and Screening Procedures

Background

Educators and researchers emphasize the importance of reliable, accurate screening and diagnostic procedures for children with disabilities, including mental retardation, learning disabilities, behavioral disabilities, and emotional disturbance. They recognize that these disabilities, unlike disabilities such as blindness, deafness, or orthopedic impairments, are difficult to detect in a child prior to attendance at school. Children with disabilities such as sensory (blindness or deafness) or orthopedic impairments are usually diagnosed long before reaching school age, and their diagnoses do not rely on psychological evaluation. Children with no physical or medical anomalies, however, typically have difficulties that are assessed by and exhibited within the school system. Usually children with these disabilities enter school unidentified and are served in the regular classroom until they begin to exhibit problems with achievement or in behavior.[1] For this reason, schools must have appropriate materials, trained staff, and sound guidelines to identify disabilities and the educational needs arising from them.

Federal disabilities education law, particularly in the IDEA, may be viewed as emphasizing a process with four distinct phases. These phases are: identification, evaluation,[2] development of an IEP, and placement. States are required to perform each phase in accordance with the requirements of Federal law under section 504 and the IDEA. However, Federal law leaves States with discretion as to how they fulfill their obligations in this regard. This chapter focuses on the identification, or screening, and evaluation, or diagnostic, phases for students with mental retardation, learning disabilities, behavioral disabilities, or emotional disturbance.

Regulations implementing Part B of the IDEA provide that all children who have disabilities, regardless of the severity of their disability, who are in need of special education and related services must be identified, located, and evaluated.[3] Each State must specify, in detail, the policies and procedures for meeting the child find requirement, including the types of activities to be carried out, the resources to be used, timelines, and expected outcomes. The State must also provide a description of the "practical method" for determining which children are or are not currently receiving needed services.[4] School districts must also provide a description of their child find activities to the State.[5]

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[1] Patricia Morison, Sheldon H. White, and Michael J. Feuer, eds., *The Use of I.Q. Tests in Special Education Decision Making and Planning* (Washington, DC: National Academy of Sciences, 1996), p. 10 (hereafter cited as Morison et al., *The Use of I.Q. Tests*).

[2] Both section 504 and Part B of the IDEA use the term "evaluation." However, other sections of the IDEA use the term "assessment" and educational studies and peers frequently refer to "assessment" as well. It appears that in the IDEA, the term "evaluation" is used primarily in the context of individual students and "assessment" is used to refer to standardized testing rather than individual assessment. Since the focus of the report is on the individual learning needs of students with disabilities, the discussion below will use mainly the term "evaluation."

[3] 34 C.F.R. §§ 300.128 and 300.220 (1996).

[4] 34 C.F.R. §§ 300.128(a)(2) and 300.128(b)(6).

In addition to difficulties in detection, researchers note that many disability categories overlap in the characteristics or symptoms that define them. Certain characteristics identified with students having learning disabilities, such as hyperactivity, hypoactivity, and attention problems, also can be characteristic of behavioral and emotional disabilities.[6] The characteristics or symptoms of behavioral and emotional disabilities can be confused with nondisability-related behavior. For example, behaviors symptomatic of attention deficit hyperactivity disorder, such as hyperactivity, can be displayed in nondisabled children during various stages of development.[7] This has led to concern that educators may not have tools sufficiently precise to ensure a clear distinction among mental retardation, learning disabilities, behavioral disabilities, and emotional disturbance, and between disability-related and nondisability-related behavior.[8]

Researchers observe that misidentification of students can affect the students' educational development and opportunities negatively. According to a 1982 report entitled *Placing Children in Special Education: A Strategy for Equity*, "[o]ne major reason why misclassification is a policy concern is that it may lead to inappropriate educational treatments."[9] Likewise, a 1996 report, *The Use of I.Q. Tests in Special Education Decision Making and Planning*, reports that "[m]isclassification can result in children receiving the wrong educational treatments."[10] One study of students with certain disabilities, ranging from behavioral disabilities, to learning disabilities, to mild to moderate mental retardation, showed that there are differences in the objectives in educating students with different types of disabilities.[11] Therefore, it appears that in identifying how to appropriately meet the educational needs of students with one or more disabilities, accurate evaluation of the students' disabilities and thorough understanding of those disabilities are crucial.

The Screening and Diagnostic Phases

In developing education programs for and placing students with disabilities in educational settings, the screening and diagnostic phases are detailed and complex. The actual procedures used in schools to identify and diagnose students with disabilities vary from school district to school district, but the general concepts are fundamentally the same. Children from birth may undergo screening and diagnostic procedures to identify whether they require special education and related services or regular education and related services.[12] Before a child or youth with a disability may receive such educational services, he or she undergoes a two phase process to determine that a disability exists: (1) identification including screening/referral and a preliminary review;[13] and (2) evaluation or diagnosis.

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[5] 34 C.F.R. § 300.220.

[6] *See* Bill R. Gearheart, *Special Education for the '80s* (St. Louis, MO: The C.V. Mosby Company, 1980), pp. 181–82, 309 (hereafter cited as Gearheart, *Special Education for the '80s*).

[7] Robert Reid, John W. Maag, and Stanley F. Vasa, "Attention Deficit Hyperactivity Disorder as a Disability Category: A Critique," *Exceptional Children*, vol. 60, no. 3 (December 1993) p. 198 (hereafter cited as Reid et al., "Attention Deficit Hyperactivity Disorder"); John W. Maag and Robert Reid, "Attention-Deficit Hyperactivity Disorder: A Functional Approach to Assessment and Treatment," *Behavioral Disorders*, vol. 20, no. 1 (1994), p. 7 (hereafter cited as Maag and Reid, "Attention-Deficit Hyperactivity Disorder: A Functional Approach").

[8] Kenneth A. Kavale and Steven R. Forness, *The Nature of Learning Disabilities: Critical Elements of Diagnosis and Classification* (Mahwah, NJ: Lawrence Ehrlbaum Publishers, 1995), pp. 8–10; Gearheart, *Special Education for the '80s*, p. 309 (citing T. Bryan and J.H. Bryan, "The Social-emotional Side of Learning Disabilities," *Behavioral Disorders*, vol. 2, no. 3 (May 1977), pp. 141–45).

[9] Kirby A. Heller, Wayne H. Holtzman, and Samuel Messick, eds., *Placing Children in Special Education: A Strategy for Equity* (Washington, DC: National Academy Press, 1982), p. 45 (hereafter cited as Heller et al., *Placing Children in Special Education*).

[10] Morison et al., *The Use of I.Q. Tests*, p. 19.

[11] James L. Nickles, Terry G. Cronis, Joseph E. Justen III, and Garnett J. Smith, "Individualized Education Programs: A Comparison of Students with BD, LD, and MMR. Do IEP Objectives Differ Across Handicapping Conditions?" *Intervention in School and Clinic*, vol. 28, no. 1 (September 1992) p. 42.

Screening is the phase during which all students in given grade levels are screened in some simple, preliminary manner to determine whether additional investigation and evaluation procedures should be initiated.[14] For example, a school may administer tests to all students in a particular grade. If a student scores far below his or her peers, this alerts the school that the student may have a learning disability, mental retardation, or some other impairment affecting educational achievement or learning ability.[15] Most schools, however, do not screen or test students to discern whether or not they should be considered for special education.

The next step in the identification phase is referral, the primary method used by schools to determine which students may require special education.[16] Referral is the referral of a student by a teacher, parent, social worker, physician, or some other person for evaluation. The teacher may refer a student because the student's work is below expectations for his or her grade or age, or because the student's behavior is disrupting learning. Parents may refer their child for evaluation because they feel that the child is not progressing as he or she should be, or because they notice particular problems in how the child learns.[17] Most school systems have guidelines to assist teachers in determining whether to make a referral. Often, the guidelines list characteristics common to particular disability categories, and they describe referral.

Children may be identified for "prereferral" interventions and strategies when school officials notice problems that are unrelated to a disability. This is different than when children are suspected of having a disability. When this occurs, a child must be referred. However, if the parents suspect that their child has a disability, under the IDEA the parents have the right to request that the school district conduct a formal evaluation even while the school district is attempting to address the educational problem through a prereferral program in the regular education classroom.[18] A school district can then advise parents as to why it believes that it would be appropriate to have the student participate in the prereferral intervention program before a formal evaluation is conducted. If the district disagrees with the parents and does not suspect that the student has a disability, the district may refuse to conduct a formal evaluation. In this instance, the school district must provide the parents with written prior notice explaining the reasons for the refusal to conduct an evaluation.[19] The parents may then request a due process hearing on the district's refusal to initiate an evaluation.[20]

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[12] Some of these children already have been identified as needing early intervention services. *See* Pub. L. No. 105–17, §§ 631–645, 671–74, 681–687 (1997).

[13] The preliminary review may or may not be used. *See* discussion in text that follows at p. 119.

[14] James E. Ysseldyke and Bob Algozzine, *Special Education: A Practical Approach to Teachers*, 3rd. ed., Boston, MA: Houghton Mifflin, 1995), p. 163. The term "screening" in this paragraph is used broadly to describe a general process applied, prior to prereferral evaluations or formal special education evaluations, to all students regardless of whether they are suspected of having a disability or other special needs. There are some prereferral and formal evaluation methods, such as battery screening tests, that use the term "screening." The use of "screening" in this paragraph is intended to have a meaning separate from those used in the description of prereferral or formal evaluation methods.

[15] Betsy B. Waterman, "Assessing Children for the Presence of a Disability" in Academy for Educational Development, National Information Center for Children and Youth with Disabilities," *News Digest*, vol. 4, no. 1 (1994), p. 3 (hereafter cited as Waterman, "Assessing Children for the Presence of a Disability").

[16] Morison et al., *The Use of I.Q. Tests*, p. 7.

[17] Waterman, "Assessing Children for the Presence of a Disability," p. 3.

[18] *See* Pub. L. No. 105–17, § 615(b)(1) (1997).

It is important to note that although the screening and referral steps in the identification phase can reveal that a student may have a disability, they do not conclusively determine that the student has a disability requiring special education and related services or regular education and related services. The screening or referral leads to the next step in the identification phase, the preliminary review, a further review of the student. The preliminary review may or may not be used prior to formal evaluation. It is a means of further considering the screening results or referrals to ensure that these steps were based on accurate and complete information. It helps prevent students from undergoing unnecessary evaluations. The reviewer will identify additional records on the student, confer with other school personnel, or observe the student in class.[21] Based on this review, the reviewer determines whether there is evidence of a disability and whether the student should receive an evaluation.

Evaluation is the diagnostic phase in this process. The term "evaluation" has a very specific meaning under Federal law. The IDEA defines this term as referring only to the procedures used to evaluate an individual child for the presence of a disability.[22] The regulations implementing the IDEA define the term "evaluation" as meaning "procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children, a school, grade, or class."[23]

Evaluation is a problem-solving phase. It involves the collection of information about a particular student.[24] A student undergoes an evaluation to determine whether he or she has a disability requiring special education, related services, or other accommodations. Specially trained personnel usually conduct the evaluation. They may include a school psychologist, a speech/language pathologist, special education and regular education teachers, social workers, and, when appropriate, medical personnel.[25] In assessing for mental retardation, a learning disability, a behavioral disability, or emotional disturbance, the school may assess a number of factors. For example, it may consider a student's educational or achievement level,[26] behavior,[27] adaptive behavior level,[28] speech and language development, level of intellectual functioning, perceptual abilities,[29] emotional and social development, and general developmental level.[30]

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[19] *See id.* § 615(3)(B), 615(c) (1997).

[20] *See id.* §615(f) (1997).

[21] Gearheart, *Special Education for the '80s*, p. 55.

[22] *See* Pub. L. No. 105–17, § 614(a)–(c) (1997).

[23] 34 C.F.R. § 300.500(b) (1996).

[24] Waterman, "Assessing Children for the Presence of a Disability," p. 2 (citing H.C. Swanson and B.L. Watson, *Educational and Psychological Assessment of Exceptional Children*, 2nd ed. (Columbus, OH: Merrill Publishing Co, 1989)).

[25] Ibid.; Maynard C. Reynolds, "Noncategorical Special Education," in Margaret C. Wang, Maynard C. Reynolds, and Herbert J. Walberg, eds., *Special Education: Research and Practice: Synthesis of Findings* (New York, NY: Pergamon Press, 1990), p. 60.

[26] Academic achievement refers to how well the child is performing in core skill areas such as reading, mathematics, and writing. Waterman, "Assessing Children for the Presence of a Disability," p. 18.

[27] Behavior is how a student conducts himself or herself. Ibid., p. 20.

[28] Adaptive behavior is the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for age and cultural groups. Herbert J. Grossman, ed., *Manual on Terminology and Classification in Mental Retardation*, 3rd ed. rev. (Washington, DC: American Association on Mental Deficiency, 1983), p. 1 (hereafter cited as Grossman, 1983 *Manual on Terminology and Classification in Mental Retardation*); Waterman, "Assessing Children for the Presence of a Disability," p. 21.

Evaluations may involve one or more components. They may rely on the use of tests, including medical and/or psychological tests.[31] In addition, evaluation information can come from sources outside of the school.[32] Information can be obtained about the student through a variety of activities. The evaluator may observe the student's interactions with parents, teachers, and peers; interview the student and others in his or her life; examine school records and past evaluation results; evaluate developmental and medical histories; use information from checklists completed by parents, teachers, or the student; evaluate curriculum requirements and options; evaluate the student's type and rate of learning during trial teaching periods; use task analysis to identify which task components already have been mastered and in what order unmastered skills need to be taught; and collect ratings on peer acceptance, classroom climate and teacher attitude toward students with disabilities.[33]

In these two phases of the process—the identification, or screening phase, including referral and the preliminary review; and the evaluation, or diagnostic phase—researchers have found that many factors can result in biased, nonneutral, or discriminatory identification and/or evaluation of a student. The criteria used in defining a disability may be so ambiguous or subjective that normal behavior mistakenly can be regarded as symptomatic of a disability.[34] Referrals and preliminary reviews can be highly subjective because they rely on the views and recommendations of individuals such as teachers based on how they perceive the student and expect the student to behave.[35] The evaluator may administer tests that were not designed to test the area or skill in which the student is having difficulty. The evaluator also may assess the student based on tests that do not accommodate for characteristics unrelated to the student's suspected disability. For example, a student with limited English proficiency may take a reading test. If the test is in English and the student performs poorly on the test, the student's native language may be a factor in his or her performance. Consequently, the evaluation for visual perception may not be accurate if this factor is not taken into account.[36] Similarly, there is concern that standardized intelligence tests do not adequately measure intelligence in students with autism because, often, the students do not understand what is required of them in test taking, even though they may have the knowledge or ability to complete the task.[37] Because of these and other factors, it is important for schools to ensure that screening and diagnostic procedures are appropriate, accurate, and nondiscriminatory for every child.

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[29] "Perceptual abilities determine how individuals perceive information and how they respond. These abilities can be subdivided into at least four general areas: visual-perceptual, auditory-perceptual, perceptual-motor skill, and attention. Assessing a student in these areas is intended to determine strengths and weaknesses in information and sensory processing and can help the evaluation team gain an understanding of how the child learns best." Waterman, "Assessing Children for the Presence of a Disability," p. 17.

[30] Waterman, "Assessing Children for the Presence of a Disability," p. 14.

[31] Gearheart, *Special Education for the '80s*, p. 58.

[32] Waterman, "Assessing Children for the Presence of a Disability," p. 4.

[33] Ibid., p. 2 (citing C. Roth-Smith, *Learning Disabilities: The Interaction of Learner, Task, and Setting* (Boston: Allyn & Bacon, 1991)).

[34] *See* Gearheart, *Special Education for the '80s*, p. 309 (citing T. Bryan and J.H. Bryan, "The Social-Emotional Side of Learning Disabilities," *Behavioral Disorders*, vol. 2, no. 3 (May 1977) pp. 141–45).

[35] *See* Eun-Ja Kim Park, Michael Pullis, Thomas F. Reilly, and Brenda L. Townsend, "Cultural Biases in the Identification of Students with Behavioral Disorders," in Reece L. Peterson and Sharon Ishii-Jordan, *Multicultural Issues in the Education of Students with Behavioral Disorders* (Cambridge, MA: Brookline Books, 1994), p. 15 (hereafter cited as Park et al., "Cultural Biases in the Identification of Students with Behavioral Disorders,") (citing J. Paul and B. Espanchin, *Emotional Disturbance in Children* (Columbus, OH: Merrill, 1982)); Heller et al., *Placing Children in Special Education*, p. 19.

[36] *See* Heller et al., *Placing Children in Special Education*, p. 59.

Federal Law and Policy Perspectives

According to history behind the IDEA and section 504 and the regulations implementing those statutes, concern about misclassification of students prompted creation of Federal requirements on the evaluation and educational decisionmaking for students identified as having disabilities. In considering legislation in 1975 that later would become the IDEA, the Senate Committee on Labor and Public Welfare "[was] deeply concerned about practices and procedures which result in classifying children as having handicapping conditions when, in fact, they do not have such conditions."[38] Likewise, before issuing the section 504 regulations in 1977, DOEd, then HEW, took note of a report by the Project on Classification of Exceptional Children documenting problems of misclassification, unnecessary labeling of children as disabled, and incorrect placements because of inappropriate selection, administration, or interpretation of evaluation materials.[39] With input from educators, advocacy groups, students with disabilities, and their parents, Congress and HEW sought to devise for educational institutions requirements that were educationally sound and promoted the goals of equal educational opportunity and nondiscrimination.[40]

The Federal requirements help to ensure that evaluation and placement procedures are appropriate and that they do not discriminate against students with disabilities. No single procedure can be used as the sole criterion for an appropriate educational program for a child.[41] IDEA regulations specify that tests and other evaluation materials must be provided and administered in the child's native language or other mode of communication, unless it clearly is not feasible to do so.[42] Section 504 regulations prohibit the use of criteria or methods that subject a qualified individual with a disability to discrimination on the basis of the disability.[43] Section 504 and IDEA regulations specify that tests and other evaluation materials must be (1) validated for the specific purpose for which they will be used; (2) tailored to measure the specific areas of educational need, not just general intelligence; and (3) selected and administered to reflect accurately the student's aptitude or achievement level, not the impaired skills.[44] The regulations also require placement decisions to be based on information from a variety of sources and made by a group of persons knowledgeable about the child, the evaluation data, and the placement options.[45]

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[37] National Council on Disability, *Improving Implementation of the Individuals with Disabilities Education Act: Making Schools Work for All of America's Children* (May 9, 1995), p. 36 (comments of Marjorie Gouldbourne at the field hearings in New York, NY) (hereafter cited as NCD, *Improving Implementation of the Individuals with Disabilities Education Act*).

[38] *See* S. Rep. No. 168, 94th Cong., 1st Sess. 26–27 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1450.

[39] 42 Fed. Reg. 22,691 (1977).

[40] *See* Pub. L. No. 94–142, § 5(a), 89 Stat. 781; 42 Fed. Reg. 22,676 (1977) (discussing section 504 rulemaking history and public comments received); 42 Fed. Reg. 22,691 (1977) ("Because the failure to provide handicapped persons with an appropriate education is so frequently the result of misclassification or misplacement, section 84.33(b)(1) makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement."); 42 Fed. Reg. 2,474 (1977) (discussing EHA rulemaking history and public participation); 42 Fed. Reg. 42,496–42,497 (1977) ("Protection in Evaluation Procedures").

[41] Pub. L. No. 105–17, § 612(a)(6)(B) (1997); and 34 C.F.R. § 300.532(d) (1996).

[42] 34 C.F.R. § 300.532(a)(1) (1996).

[43] *Id.* § 104.4(b)(4) (1996).

[44] *Id.* §§ 104.35(b), 300.532(a)–(c) (1996).

Addressing Barriers to Neutral and Nondiscriminatory Screening and Diagnosis

Even with Federal requirements to guide schools in identifying and evaluating students with mental retardation, learning disabilities, behavioral disabilities, and emotional disturbance, much concern has continued to focus on misclassification problems and the implementation of appropriate identification (screening) and formal evaluation (diagnostic methods) in schools. A variety of literature has addressed different issues on the misidentification of students. The National Council on Disability's 1995 report, *Improving Implementation of the Individuals with Disabilities Education Act: Making Schools Work for All of America's Children* (1995 IDEA report), mentions that one of the common themes of field hearings on the IDEA was that "[t]he current system of identifying students as eligible for special education . . . fails to identify some needy students as eligible, [and] overidentifies children from minority backgrounds as disabled."[46] Studies report on overidentification of students as having mental retardation, learning disabilities, and attention deficit disorder, meaning classification of students as having these disabilities when they, in fact, do not.[47] For example, one study revealed that at least one-half of the population of students classified as learning disabled could be described more accurately as slow learners, as children with second language backgrounds, as children who misbehave in class, and as those who have absentee problems.[48] Another study found some evidence that ethnic minorities may be overidentified as having attention deficit hyperactivity disorder.[49]

Scholars and researchers also have discussed problems with underidentification—the failure to identify and address a disability of a student.[50] One scholar noted studies reporting that fewer than one-half of the children with emotional disturbance in the U.S. are being identified and provided special education services.[51] Others reported that, particularly in large urban areas in United States, students with limited English proficiency face potential underidentification for eligibility for special education programs.[52] To a more limited extent, there also has been mention of mistaken identification—when the student mistakenly is identified as having one type of disability when he or she actually has a different type of disability. For instance, the National Council on Disability's 1995 IDEA report noted how some parents at field hearings recounted a number of bad experiences occurring because their children with neurobiological disorders were placed in inappropriate special education categories, such as "seriously emotionally disturbed" and communication and behavior disorders.[53]

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[45] *Id.* §§ 104.35(c), 300.532(e) (1996).

[46] NCD, *Improving Implementation of the Individuals with Disabilities Education Act*, p. 10.

[47] *See* Russell Gersten and John Woodward, "The Language-Minority Student and Special Education: Issues, Trends, and Paradoxes," *Exceptional Children*, vol. 60 (February 1994), pp. 344, 348; Reid et al., "Attention Deficit Hyperactivity Disorder," p. 198.

[48] Donald L. Moecker, "Special Education Decision Processes for Anglo and Hispanic Students," (paper presented at The Annual Convention of the Council for Exceptional Children, Baltimore, MD, Apr. 13–17, 1992), p. 2 (citing L. A. Shepard and M.L. Smith, *The Identification, Assessment, Placement, and Remediation of Perceptual and Communicative Disordered Children in Colorado (Final Report)* (Boulder, CO: Boulder Laboratory of Educational Research, University of Colorado, 1981)), *reproduced by* EDRS, ED# 301 319 (hereafter cited as Moecker, *Anglo and Hispanic*).

[49] J.J. Bauermeister, V. Berrios, A.L. Jimenez, L. Acevedos, and M. Gordon, "Some Issues and Instruments for the Assessment of Attention-deficit Hyperactivity Disorder in Puerto Rican Children," *Journal of Clinical Child Psychology*, vol. 19 (1990), pp. 9–16.

[50] *See* Park et al., "Cultural Biases in the Identification of Students with Behavioral Disorders," pp. 22–23 (discussing the underidentification of students with behavior disorders); Steven R. Forness and Jane Knitzer, "A New Proposed Definition and Terminology to Replace 'Serious Emotional Disturbance' in Individuals with Disabilities Education Act," *School Psychology Review*, vol. 21, no. 1 (1992), pp. 12–20 (writing that "[m]ore so than any other category of special education, children with serious emotional disturbance remain very much underidentified in our nation's schools").

[51] Theresa Glennon, "Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities," *Tennessee Law Review* (vol.60) pp. 295, 295–304 (Winter 1993).

In each case, the problems of over-, under-, or mistaken identification of students can lead to the same consequence—the student's educational program does not match his or her educational needs. Research has identified at least two factors to the overidentification, underidentification, or mistaken identification of students' educational needs: (1) problems in defining certain disabilities for the purpose of identifying educational needs and services, and (2) problems with screening and diagnostic methods.

Defining Disabilities: Mental Retardation, Learning Disabilities, Behavioral Disabilities, and Emotional Disturbance

Scholars and researchers recognize the usefulness of definitions to diagnosis. Definitions detail criteria necessary for determining that a student has one particular disability or another, and proper diagnosis can then assist schools in identifying what services and/or accommodations will meet the student's educational needs. They also facilitate research efforts.[54]

Definitions themselves for disabilities, however, also can lead to problems in appropriately serving the educational needs of students with disabilities. For example, one scholar expresses concern that diagnostic criteria in a definition, when defined too narrowly, can deprive some students of appropriate education and related services although they may legitimately need special education or other services. Discussing the prevalent use of the term "serious emotional disturbance" in laws and policies, she contends that because the definition requires the emotional disorder to be "serious," it prevents schools from identifying students who clearly have an emotional disability but who do not satisfy school officials that the disability is serious to a "marked degree."[55]

Other scholars and researchers espouse that diagnostic criteria in definitions, when too ambiguous or subjective in nature, can result in students being overidentified as having disabilities when they, in fact, do not.[56] In addition, there is no single standard for defining disabilities such as learning disabilities, mental retardation, behavioral disabilities, and emotional disturbance. A 1991 study of State definitions for identifying

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[52] Gersten and Woodward, "The Language-Minority Student," p. 315.

[53] NCD, *Improving the Implementation of the Individuals with Disabilities Education Act*, p. 50.

[54] *See generally* Kavale and Forness, *The Nature of Learning Disabilities*; Laura F. Rothstein, *Special Education Law* (White Plains, NY: Longman Publishers, 1995), chap. 6, "Identification and Evaluation," pp. 89–108. *See* Gearheart, *Special Education for the '80s*, pp. 64, 70, 254 (citing D.L. MacMillan, *Mental Retardation in School and Society* (Boston: Little, Brown and Co., 1977) and N. Hobbs, *The Futures of Children* (San Francisco: Jossey-Bass Publishers, 1974)); Michael H. Epstein, Douglas Cullinan, and David A. Sabatino, "State Definitions of Behavior Disorders," *The Journal of Special Education*, vol. 11, no. 4 (1977), p. 418 (hereafter cited as Epstein et al., "State Definitions of Behavior Disorders").

[55] Glennon, "Disabling Ambiguities," p. 343.

[56] *See* Maag and Reid, "Attention-Deficit Hyperactivity Disorder: A Functional Approach," pp. 5–23 (discussing concerns with the DSM–R–III definition for ADHD); Reid et al., "Attention Deficit Hyperactivity Disorder," p. 198; The Council for Children with Behavioral Disorders, "Best Assessment Practices for Students with Behavioral Disorders: Accommodation to Cultural Diversity and Individual Differences," *Behavioral Disorders*, vol. 14, no. 4, April 1989, pp. 263–78, *reprinted in* Reece L. Peterson and Sharon Ishii-Jordan, *Multicultural Issues in the Education of Students with Behavioral Disorders* (Cambridge, MA: Brookline Books, 1994), p. 266.

children with mental retardation found that 64 percent of the States used the 1973 American Association of Mental Retardation's (AAMR's) definition. The remaining 36 percent showed significant variability in the definitions they had developed.[57] Scholars writing on the education of behaviorally disordered students note, "[a] lack of consensus exists among educators and researchers on distinguishing who is, and who is not, behaviorally disordered."[58]

The existing definitions for disabilities can be classified into different types based on purpose.[59] First, definitions developed by the medical community and researchers characterize specific mental and physical conditions for clinical diagnoses. Second, definitions in Federal and State laws and regulations provide the criteria for determining eligibility for certain services. For example, the IDEA and its implementing regulations[60] and State laws and regulations[61] define certain disabilities for the purpose of delineating who is eligible for special education and related services. Some State definitions, though not all, are modeled on those found in the IDEA and its implementing regulations.[62] Third, definitions in laws and regulations such as those for section 504 and the Americans with Disabilities Act set out the criteria for determining who is covered by civil rights protections.[63]

Often, there can be overlap in the definitions used for these different purposes. For example, some definitions in State education regulations are based in whole or in part on those adopted by professional organizations, such as the American

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[57] William Frankenberger and Kathryn Fronzaglio, "States' Definitions and Procedures for Identifying Children with Mental Retardation: Comparison Over Nine Years," *Mental Retardation*, vol. 22, no. 6 (December 1991), p. 317. *See* chap. 2, pp. 17–18, for the 1973 AAMR definition. Frankenberger and Fronzaglio also found that, for States delineating adaptive behavior as one of the criteria for mental retardation, "there is little agreement on how deficits in adaptive behavior should be quantified. In fact, none of the states specifying adaptive criteria employ the same method." Ibid., p. 318.

[58] Park et al., "Cultural Biases in the Identification of Students with Behavioral Disorders," p. 21. *See also* Frank H. Wood, "Issues in the Education of Behaviorally Disordered Students," in Margaret C. Wang, Maynard C. Reynolds, and Herbert J. Walberg, eds., *Special Education: Research and Practice: Synthesis of Findings* (New York, NY: Pergamon Press, 1990), p. 114; Epstein et al., "State Definitions of Behavior Disorders," pp. 417–25.

[59] *See* Epstein et al., "State Definitions of Behavior Disorders," p. 418.

[60] *See* Pub. L. No. 105–17, § 602(3)(A)–(B) (1997); 34 C.F.R. § 300.7(b) (1996).

[61] *See, e.g.*, N.J. Stat. § 18A:46–9(a) (Michie 1996) (defining educable mentally retarded children); Alaska Admin. Code tit. 4, § 52.130(b),(c),(d) (1996) (listing criteria for determination of eligibility for special education and related services as "a mentally retarded child," "a child with a learning disability," and "a seriously emotionally disturbed child"); Ariz. Admin. Code tit. 7, § R7–2–401A(30) (1995) (defining "socially maladjusted"); Conn. Agencies Regs. § 10–76a–2(d),(e)&(m) (1996) (defining identifiable learning disability, mentally retarded, and socially and emotionally maladjusted); Fla. Admin. Code Ann. r. 6A–6.03018(1) (1996) (defining specific learning disabilities); Ga. Comp. R. & Regs. r. 160–4–7–.08(3),(5)&(9) (1996) (defining emotional and behavioral disorder, intellectual disability and specific learning disability); Ill. Admin. Code tit. 23, § 226.552(e),(f)&(g) (1996) (defining specific learning disability, behavior disorder/emotional disorder, mental impairment); Kan. Admin. Regs. 91–12–22(e),(bb)(1),(vv) (1996) (defining behavior disorder, educable mental retardation, specific learning disability); N.J. Admin. Code tit. 6, § 6:28–3.5(d) (1996) (defining emotionally disturbed, educable mentally retarded, perceptually impaired).

[62] *Compare* Pub. L. No. 105–17, § 602(26) (1997) and 34 C.F.R. § 300.7(b)(10) (1996) *with* Ill. Admin. Code tit. 23, § 226.552(e) (1996) (defining "specific learning disability). *Compare* 34 C.F.R. § 300.7(b)(5) (1996) (defining "mental retardation") *with* Ga. Comp. R. & Regs. r. 160–4–7–.08(5)(1) (1996) (defining "intellectual disabilities").

[63] *See* 34 C.F.R. § 104.3(j) (1996) (defining "handicapped person").

Association of Mental Retardation.[64] Although reliance on professional definitions does provide some consistency, various researchers and scholars have expressed concerns about the use of one type of definition for a different purpose (i.e., relying on part or all of a medical or clinical definition for determining eligibility for educational services). For instance, one researcher criticizes the use of the term "serious emotional disturbance" because it limits special education services to the seriously, nonsocially maladjusted children and youth. He contends that this terminology thus negates clinical data indicating that emotional problems occur in approximately 10 percent of school children in moderate to serious levels.[65] Other researchers note that reliance on the clinical definition of Attention Deficit Hyperactivity Disorder (ADHD) provided by the American Psychiatric Association in its *Diagnostic and Statistical Manual of Mental Disorders* (DSM) does not provide educators with information necessary for making evaluation and treatment decisions.[66]

The definitions of disabilities used to determine eligibility for special education can vary among different States and local school districts. For example, in Illinois, the characteristics for determining eligibility of children with behavior disorders and emotional disorders for special education do not specifically exclude social maladjustment. In addition, Illinois requires symptoms to be manifested "to a marked degree" for eligibility.[67] Georgia has similar criteria for eligibility.[68] In Alaska, however, students who are socially maladjusted are ineligible unless they are determined to have a "serious emotional disturbance."[69]

According to researchers, the lack of consistency can present problems. Because of the ambiguous and subjective nature of some of these definitions, there are no guarantees that school districts within the same State will interpret and apply the State definitions uniformly. Therefore, it is possible for a student to be regarded as having a disability in one State or school system, yet not be considered as having one in another.[70] As a result, a student receiving special education and related services in one school district could become ineligible for such education and services on transferring to another school system or other State.[71] For instance, based on the State eligibility criteria described above, a child with an emotional disturbance receiving special education and related services in Illinois or Georgia, could

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[64] *See* Kan. Admin. Regs. 91–12–22(bb)(1) (1995) ("Educable mental retardation" means "(A) Mild retardation according to the mental deficiency classification, as prescribed in "Definitions and Classifications in Mental Retardation, Ninth Edition," edited by Luckasson et al., published by the American Association on Mental Deficiency, dated 1973, revised 1983 and 1992; and (B) possession of functional capabilities which can be developed to aid the individual in interaction and decisionmaking."). *See also* Frankenberger and Fronzaglio, "States' Definitions and Procedures," p. 318 (noting that over the years from 1981 to 1991, more States have developed I.Q. cutoffs consistent with the 1983 AAMR criteria in their guidelines for identifying children with mental retardation).

[65] Eli M. Bower, "Defining Emotional Disturbance: Public Policy and Research," *Psychology in the Schools*, vol. 19 (1982), p. 60.

[66] Maag and Reid, "Attention-Deficit Hyperactivity Disorder: A Functional Approach," p. 17 (referring to the third edition of the Diagnostic and Statistical Manual of Mental Disorders, the DSM–III–R).

[67] Ill. Admin. Code tit. 23, § 226.552(f) (1996).

[68] *See* Ga. Comp. R. & Regs. r. 160–4–7–.08(3) (1996).

[69] Alaska Admin. Code tit. 4, § 52.130(d) (1996).

[70] OSERS and OCR have issued joint policy guidance that provides that when a student changes school districts within the same State, the new school district either must accept the student's IEP or develop a new IEP within 30 days. If the parents dispute the new IEP, the school district must place the student in a program that most approximates the IEP in the prior district, until the dispute is resolved.

[71] Frankenberger and Fronzaglio, "States' Definitions and Procedures," p. 320; Heller et al., *Placing Children in Special Education*, pp. 18–19.

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be found ineligible for such education and services in Alaska, if the child's diagnosis revealed a mild or moderate emotional disturbance, but not a serious or severe one, or if it were interpreted "only" as social maladjustment.

With the definition of disability under section 504, there is no distinction between types or categories of disabilities. A student either has a disability or does not. For learning disabilities, mental retardation, behavioral disabilities, and emotional disturbances, a student need only be found to have "a physical or mental impairment which substantially limits one or more major life activities," to be covered under section 504.[72] Coverage under section 504, however, is not the basis for determining eligibility for special education and related services, although it does make applicable to the student the nondiscrimination protections of section 504.[73] Once it is established that a student is covered under section 504, a public elementary or secondary school receiving Federal funding is required to provide the student a free appropriate public education, which may not necessarily include special education but can include accommodations in the regular education class.[74] At least one State, Massachusetts, has followed this noncategorical approach in defining who is eligible for special education. The Code of Massachusetts Regulations does not base eligibility on categories of disabilities. Instead, a student need only be a "[c]hild in need of special education."[75] The National Council on Disability's 1995 IDEA report observes that the Massachusetts approach has been commended for facilitating inclusion of students with disabilities in the regular class, reducing stigma, and improving reliance on individualized planning.[76] It is unclear, however, whether the approach has reduced misidentification problems and improved access to special education services for those students in need of such services.

Another major concern about disability definitions among researchers, scholars, educators, and advocates is the ambiguous and subjective nature of such definitions.[77] According to the National Council on Disability's 1995 IDEA report, a common theme of hearings on the IDEA was that "[t]he current system of identifying students as eligible for special education. . .often employs assessment criteria that are inappropriate for students or insensitive to their cultural and communication backgrounds."[78] Among different definitions for behavioral disabilities,[79] each is based on behavior which violates cultural norms regarding what is appropriate and acceptable and which deviates significantly from behavior appropriate to one's age;[80] yet, the definitions do not indicate what is the basis or norm for determining appropriate and acceptable behavior. As a result, scholars suggest that there is a tendency for schools to rely on social norms in determining whether a student's behavior is deviant; they express concern that such reliance can overlook possibilities that the student's behavior could be considered normal, appropriate, and entirely acceptable were it not being judged against a particular subjectively defined social norm.[81] The tendency to rely on social norms can, in turn, result in overidentification of students as behaviorally disabled although some of those students have no disability.

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[72] *See* 34 C.F.R. § 104.3(j) (1996) (defining "handicapped person").

[73] *See* 34 C.F.R. § 104.4 (1996) (discrimination prohibited).

[74] *See* 34 C.F.R. § 104.33(a) (1996) (requiring a "recipient that operates a public elementary or secondary education program to provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap"); *id.* § 104.33(b) and app. A, no. 23 (an appropriate education is the provision of regular or special education and related aids and services, which could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services).

[75] *See* Mass. Reg. Code tit. 603, § 28.104.0(a) (1996). Iowa and North Dakota also have noncategorical approaches.

[76] *See* NCD, *Improving the Implementation of the Individuals with Disabilities Education Act*, p. 31 (comments of Martha Ziegler at the field hearings in Boston, MA).

[77] *See* Park et al., "Cultural Biases in the Identification of Students with Behavioral Disorders," p. 21; Ellen McGinnis, John Kiraly, Jr., and Carl R. Smith, "The Types of Data Used in Identifying Public School Students as Behaviorally Disordered," *Behavioral Disorders*, vol. 9 (1984), p. 239.

[78] NCD, *Improving Implementation of the Individuals with Disabilities Education Act*, p. 10.

[79] *See, e.g.*, Kan. Admin. Regs. 91–12–22(e) (1995); Ill. Admin. Code tit. 23, § 226.552(f) (1996).

[80] *See* Park et al., "Cultural Biases in the Identification of Students with Behavioral Disorders," pp. 14–15 (citing J. Kauffman,

With the definition for learning disabilities, education research has indicated major concerns with the ill-defined boundaries as to the meaning of the term and the concomitant use of the learning disabled (LD) category as a kind of "catch-all classification" where students who were formerly classified in other categories are now classified as LD.[82] The problems associated with the LD classification operating as a catch-all are numerous and complex. Although the IDEA's and other definitions of LD explicitly acknowledge the idea of specificity by using the term "specific learning disability," these definitions are undermined because in attempting to be comprehensive they include "an extensive catalogue of possible deficits."[83] As a result, LD is "defined on the basis of any number of problems in any number of areas."[84]

These difficulties in specifying LD have led to its becoming primarily a quantitative phenomenon. Mild mental retardation and behavioral disorders, on the other hand, are not only quantitatively but qualitatively different as they become more severe. The mild mental retardation (MMR) and behavioral disorder (BD) fields have begun applying more stringent qualitative criteria associated with more severe levels of these disabilities.[85] LD, however, because it is based on a purely quantitative evaluation, "cannot adjust its eligibility criteria to introduce more precision and less equivocation in diagnosis."[86]

Two scholars have stated their belief that, as a result of legislation and litigation affecting the basic character of certain disabilities definitions such as MMR and BD toward more severe conditions, populations of students who would once have been classified as having mild mental retardation or a behavioral disorder are now being classified as having LD.[87] These authors state that "[t]he research showing a decline in the I.Q. scores of the LD population and burgeoning literature on the social/emotional deficits of LD students is compelling evidence that the LD field is incorporating students who would previously have been designated MMR or BD."[88] Moreover, these authors state that "[c]onvincing arguments

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Characteristics of Children's Behavior Disorders, 3rd ed. (Columbus, OH: Merrill, 1985); J. Paul and B. Espanchin, *Emotional Disturbance in Children* (Columbus, OH: Merrill, 1982); and E. Rothman, *The Angel Inside Went Sour* (New York: David McCay Co., Inc., 1970)); Epstein et al., "State Definitions of Behavior Disorders," pp. 419–20; Maag and Reid, "Attention-Deficit Hyperactivity Disorder: A Functional Approach," p. 7.

[81] *See* Reece L. Peterson and Sharon Ishii-Jordan, "Multicultural Education and the Education of Students with Behavioral Disorders," in Reece L. Peterson and Sharon Ishii-Jordan, *Multicultural Issues in the Education of Students with Behavioral Disorders* (Cambridge, MA: Brookline Books, 1994), pp. 7–8 (hereafter cited as Peterson and Ishii-Jordan, "Multicultural Education").

[82] *See* Kavale and Forness, *The Nature of Learning Disabilities*, pp. 8–10.

[83] Ibid., p. 11.

[84] Ibid.

[85] Ibid., p. 9.

[86] Ibid.

[87] Ibid.

[88] Ibid.

have been presented for the difficulties in distinguishing among MMR, BD, and LD youngsters."[89]

These two scholars state further that the problem of overclassification in the LD category is compounded by the perception of LD as a "less stigmatizing" classification with parents who want special educational assistance for their children actively seeking an LD diagnosis.[90] Issues such as these relating to the definition for LD have led these scholars to conclude that:

> [t]he LD field can no longer afford to be all things to all people. It cannot accommodate the residual MMR and BD students who no longer qualify under revised qualifications. These areas of special education have striven to maintain their integrity by modifying (i.e., tightening) their eligibility criteria. The LD field can do no less if it is to resolve the fundamental problems associated with a large and heterogeneous membership. Political, ideological, and philosophical pressures must be cast aside so that attempts to regain control of the LD field can be initiated.[91]

Elsewhere, with the use of the modifier "serious" when referring to "emotional disturbance," for example, some scholars and researchers contend that delineating between a "serious" emotional disorder and one that is not serious is highly subjective.[92] By using the word "serious," they contend, many students with emotional disorders are likely not to be identified for special education or receive assistance because their problems did not appear to the evaluator severe enough.[93] As a result of these concerns, Congress in its 1997 amendments to the IDEA, removed the word "serious" in its references to "emotional disturbance."[94] However, the change in the statutory terminology was essentially a cosmetic change since the IDEA amendments did not address the concerns of the education community on this issue any further. In addition, many States still use the term "serious" in their legal definitions of the term.

Other problems remain in accurately defining emotional disorders. One such problem is that emotional disabilities, unlike physical disabilities, often are not apparent. Further, they manifest themselves in several ways. An individual with an emotional disorder may be disruptive and aggressive, or, at the other extreme, he or she may be withdrawn, unresponsive, and depressed.[95] As a result, there is no general set of descriptive statements to characterize all emotionally disturbed children;[96] in fact, they are a very diverse population.

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[89] Ibid. (citing D.P. Hallhan & J. M. Kauffman, "Labels, Categories, Behaviors: ED, LD, and EMR Reconsidered," *Journal of Special Education*, vol. 11 (1977), pp. 139–49).

[90] Ibid., p. 11.

[91] Ibid.

[92] *See* discussion on pp. 124–26 of this chapter.

[93] James M. Kauffman, John Wills Lloyd, John Baker, and Teresa M. Riedel, "Inclusion of All Students with Emotional or Behavioral Disabilities? Let's Think Again," *Phi Delta Kappan* (March 1995), p. 542 (citing Invisible Children Project: Final Report and Recommendations of the Invisible Children Project (Alexandria, VA: National Mental Health Association, 1989); and Richard E. Mattison and Alan D. Gamble, "Severity of Socially and Emotionally Disturbed Boys' Dysfunction at School and Home: Comparison with Psychiatric and General Population Boys," *Behavioral Disorders*, vol. 17 (1992), pp. 219–24). *See also* Wood, "Issues in the Education of Behaviorally Disordered Students," p. 105; Bower, "Defining Emotional Disturbance," pp. 58–59.

[94] *See* Pub. L. No. 105–17, § 602(3)(A)(i) (1997).

[95] *See* Glennon, "Disabling Ambiguities," pp. 304–05.

The complexities in defining learning, emotional, and behavioral disabilities is illustrated by the fact that where the quantitative nature of the LD diagnosis presents a problem in that field, the lack of quantifiability with emotional disorders presents a problem as well. Because there is no quantifiable element to define emotional disturbance, such as low achievement among those with learning disabilities or mental retardation, emotionally disturbed students can be those who perform below, at, or above the average academic level for their age group.[97] Identification, therefore, ordinarily relies more on subjective methods such as teacher judgments and teacher referrals.[98] With these methods, researchers have found that the sex or age of the child, the sex of the teacher, the fact that the teacher has been told that the child is emotionally disturbed, and other such factors can influence the judgment of the teacher.[99] As with the problems with defining behavioral disorders, teachers and evaluators may not identify the right children as having emotional disorders because of stereotypes or a lack of knowledge and/or understanding of the child's cultural or social background. One result is the overidentification of students who exhibit behaviors similar to the stereotypical characteristics of "externalizing" emotional disorders. For example, teachers and evaluators may confuse juvenile delinquents or victims of child abuse with students having emotional disturbance.[100]

Because diagnosis based on these definitions requires the evaluator to judge the appropriateness of a student's behavior or emotions, scholars suggest that it is critical to consider what standard or norm will define appropriate behavior or emotions.[101] To address that concern, there have been efforts to modify traditional screening and diagnostic procedures so that a student's social and cultural background and other criteria are considered. There also have been efforts to modify disability definitions to account for the relationship between cultural and family background and other factors to behavioral and emotional characteristics. For example, in 1992, the American Association on Mental Retardation (AAMR) revised its definition for mental retardation.[102] Concerned about problems in identification, particularly the overidentification of minority students as mentally retarded, the AAMR created a new way of defining mental retardation.

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[96] Ysseldyke and Algozzine, *Special Education*, pp. 345–46. The same observation has been raised with students who have attention deficit hyperactivity disorder (ADHD). *See* Maag and Reid, "Attention-Deficit Hyperactivity Disorder: A Functional Approach," p. 8 ("The DSM–III–R criteria, requiring the presence of 8 of 14 behaviors, means that over 3,000 possible different combinations exist on which a diagnosis of ADHD could be based. Thus, there is no 'typical' ADHD child.").

[97] Ysseldyke and Algozzine, *Special Education*, pp. 345–46.

[98] Ibid., p. 306.

[99] Paul E. Carlson and Thomas M. Stephens, "Cultural Bias and Identification of Behaviorally Disordered Children," *Behavioral Disorders* (May 1986), pp. 196–98; Gearheart, *Special Education for the '80s*, p. 306 (citing T.J. Kelly, L.M. Bullock, and M.K. Dykes, "Behavioral Disorders: Teachers' Perceptions," *Exceptional Children*, vol. 43, no. 5 (February 1977), pp. 316–17; L.H. Rich, "Behavior Disorders and School: A Case of Sexism and Racial Bias," *Behavioral Disorders*, vol. 2, no. 4 (August 1977), pp. 201–04; R.A. Rubin and B. Balow, "Prevalence of Teacher Identified Behavior Problems: A Longitudinal Study," *Exceptional Children*, vol. 45, no. 2 (October 1978), pp. 102–10; and J.E. Ysseldyke and G.G. Foster, "Bias in Teachers' Observations of Emotionally Disturbed and Learning Disabled Children," *Exceptional Children*, vol. 44, no. 8 (May 1978), pp. 613–15).

[100] Gearheart, *Special Education for the '80s*, p. 309.

[101] Peterson and Ishii-Jordan, "Multicultural Education," p. 11.

[102] The American Association on Mental Deficiency's (now the AAMR) 1977 and 1983 *Manual on Terminology and Classification in Mental Retardation* define mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period." Herbert J. Grossman, ed., American Association on Mental Deficiency, *Manual on Terminology and Classification in Mental Retardation* (Baltimore: Garamond/Pridemark Press, 1977), p. 11 (hereafter cited as Grossman, 1977 *Manual on Terminology and Classification in Mental Retardation*); Grossman, 1983 *Manual on Terminology and Classification in Mental Retardation*, p. 1.

The current AAMR definition involves a three-step procedure for diagnosing, classifying, and determining the needed supports for an individual with mental retardation.[103] First, the school must determine the student's eligibility for supports. The student must score an I.Q. of 70 to 75 or below, demonstrate significant disabilities in two or more adaptive skill areas, and be of an age of onset below 18. Second, the school must identify strengths and weaknesses and the need for support across four dimensions: intellectual functions and adaptive skills, psychological/emotional considerations, physical/health/etiological considerations, and environmental considerations. Third, the school must identify the kind and intensities of supports needed for each of the four dimensions. The new definition is based on four basic assumptions: (1) valid evaluation considers cultural and linguistic diversity, as well as differences in communication and behavioral factors; (2) the existence of limitations in adaptive skills occurs within the context of community environments typical of the individual's age peers and is indexed to the person's individualized needs for support; (3) special adaptive limitations often coexist with strengths in other adaptive skills or other personal capabilities; and (4) with appropriate supports over a sustained period, the life functioning of the person with mental retardation generally will improve. According to one observer, "Rather than limiting assessment to intellectual and adaptive skills, the current AAMR definition relies upon a multidimensional approach to describing individuals and evaluating their responses to present growth, environmental changes, educational activities, and therapeutic interventions."[104]

As with the definition for mental retardation, the current IDEA definition for emotional disturbance contains no reference to cultural considerations. A new definition, proposed by the National Mental Health and Special Education Coalition, would replace the term "emotional disturbance" with a new term, "emotional or behavioral disorder." Under the proposed definition, an emotional or behavioral disorder would mean "a disability characterized by behavioral or emotional responses in school *so different from appropriate age, cultural, or ethnic norms* that they adversely affect educational performance."[105] Because of the definition's reference to cultural or ethnic norms, local community norms or standards will be an important consideration.[106] The authors of the proposed definition note that standards have not been well developed to establish what constitutes "appropriate age, cultural, or ethnic norms." Therefore, they recommend that school personnel "should consult education or mental health professionals, community leaders, or other key informants from the child's or youth's ethnic or cultural background as to appropriate behavioral or emotional responses and the extent of the differences involved in each particular case."[107]

One conclusion that can be deduced from the concerns presented is a need to incorporate clearer criteria for deciding how subjective factors, such as behavior and emotions, will be measured. If diagnosis is dependent on finding inappropriate or unacceptable behavior or feelings, it is critical to know the parameters for determining what is appropriate and acceptable. Such specificity in the definitions will assist in reducing problems of overidentification, and it will help to ensure that all aspects of a child's background, including home life, culture, and social background, will be considered in the screening and diagnostic processes for evaluating students for disabilities.

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[103] Charlotte Hawkins-Shepard, "Mental Retardation," ERIC Digest EDO-EC-93-11 (September 1994) (Reston, VA: Clearinghouse on Disabilities and Gifted Education, Council on Exceptional Children, 1994).

[104] Ibid.

[105] Forness and Knitzer, "A New Proposed Definition," p. 13. *See also* Steve Forness, "Planning for the Needs of Children with Serious Emotional Disturbance: The National Special Education and Mental Health Coalition," *Behavioral Disorders*, vol. 13 (1988), pp. 127–39.

[106] Steven R. Forness and Jane Knitzer, "A New Proposed Definition and Terminology to Replace 'Serious Emotional Disturbance' in Individuals with Disabilities Education Act," *School Psychology Review*, vol. 21, no. 1 (1992), p. 14.

[107] Ibid., p. 14.

In viewing all the problems associated with definitions for disabilities, the approach under section 504 appears most effective in ensuring that students with disabilities are afforded equal educational opportunity. This is not to say that categorical disability definitions should be eliminated. They clearly serve an important purpose. They can promote further identification of clinical diagnoses, research into cause and cure, and discovery of improved instructional strategies or improvements in learning.

In fact, according to the National Council on Disability's 1995 IDEA report, witnesses attending field hearings on the IDEA expressed concerns about changes in disability definitions. One witness feared that changes could result in denial of services for some students with disabilities or placement in regular classes without appropriate support services. Another witness opposed disregarding categorical disability definitions altogether, because then schools might not be accountable for the services they provide.[108] The IDEA report, however, also recounted some problems with the use of definitions by category of disability. One witness described recurring situations where children leave psychiatric treatment facilities and then attempt to access special education services through schools. According to the witness, such children have undergone psychiatric evaluations that use medical definitions not relied on by schools. The children must then undergo evaluations by psychologists who will use the schools' definitions to determine eligibility for special education services.[109]

In terms of serving the educational needs of students with mental retardation, learning disabilities, behavioral disabilities, and emotional disturbance, students should not have to "fit" into categorical definitions to get needed services. To do so denies those students who do not fall within certain definitions equal educational opportunity, because their educational needs go unmet or are inappropriately served. Similarly, for those overidentified into a disability category, they too may receive educational services inappropriate to their needs.

With the IDEA Amendments of 1997, Congress has sought to address the problem of disabilities categories driving the process through which schools provide students with special education and related services under Part B of the IDEA. Congress expanded service eligibility by changing the definition of "developmental delay" to include children ages 3 through 9, Congress increased the age at which a local educational agency identifies a student as having a particular kind of disability (within one of the statute's 13 disabilities categories).[110] The legislative history of the statute indicates that Congress' intent behind this change was to address the problem of "[t]he use of a specific disability category to determine a child's eligibility for special education and related services" frequently leading to "the use of the category to drive the development of the child's Individualized Education Program (IEP) and placement to a greater extent than the child's needs."[111] In addition, Congress noted that "in the early years of a child's development, it often is difficult to determine the precise nature of the child's disability. Use of "'developmental delay' as part of a unified approach will allow the special education and related services to be directly related to the child's needs and prevent locking the child into an eligibility category which may be inappropriate or incorrect, and could actually reduce later referrals of children with disabilities to special education."[112]

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[108] NCD, *Improving Implementation of the Individuals with Disabilities Education Act*, p. 33.

[109] Ibid., p. 51.

[110] *See* Pub. L. No. 105–17, § 602(3)(B) (1997).

[111] *See* H. Rep. No. 105–95, at 86 (1997).

Defining Disabilities and Assessing Eligibility Criteria: OCR's Enforcement Efforts

OCR's approach to issues that involve definitions of disabilities generally occurs in two ways. First, OCR determines who is protected under the section 504 regulations. As mentioned above, OCR applies a general definition of "handicapped person" to determine whether students with disabilities are protected under section 504.[113] Therefore, it considers whether the student has "a physical or mental impairment which substantially limits one or more major life activities."[114] Major life activities include functions such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[115]

The second way OCR approaches definitions of disabilities is to consider whether the definitions used by States or local school districts and their criteria for determining a student's eligibility for special education violate section 504 and other civil rights laws. For example, in one case, a parent alleged that one of the school district's eligibility criteria for classifying a student as learning disabled violated section 504. The criterion in question provided that a student could not be found eligible as learning disabled, if he or she was succeeding in regular education. OCR considered the criterion in relation to the section 504 regulations' definition of a "qualified handicapped person." It concluded that, "by definition, a person who is succeeding in regular education does not have a disability which substantially limits the ability to learn."[116] OCR also considered the criterion in relation to the definition of specific learning disabilities. OCR found that the "purpose of the LD eligibility determination is to establish the basis for providing special education services to students who need such services to benefit from education. A student who is already succeeding in regular education would not need special education to obtain this level of benefit, and, thus would not meet the standards established for LD eligibility."[117] Based on this evaluation, OCR concluded that the criterion did not, on its face, violate section 504.[118] OCR did note that although the psychologist concluded that the student was succeeding in the regular program, it was not readily evident that others would consistently conclude that the student's performance in classes constituted success in regular education. Therefore, OCR encouraged the school district to "better define the level of classroom performance and other factors which are used to determine that a student is succeeding in regular education

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112 Ibid.

[113] *See* Robert R. Davila, Assistant Secretary, Office of Special Education and Rehabilitative Services, Michael L. Williams, Assistant Secretary, Office for Civil Rights (OCR), and John T. MacDonald, Assistant Secretary, Office of Elementary and Secondary Education, U.S. Department of Education (DOEd), memorandum to Chief State School Officers, "Clarification of Policy to Address the Needs of Children with Attention Deficit Disorders with General and/or Special Education," Sept. 16, 1991 (hereafter cited as Davila and Williams memorandum on ADD). *See* p. 124 above.

[114] *See* 34 C.F.R. § 104.3(j) (1996) (defining "handicapped person"). It also considers whether the student is "qualified" by determining whether that student is "(i) of an age during which nonhandicapped persons are provided [preschool, elementary, secondary, or adult] services, (ii) of an age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required a provide a free appropriate public education under section 612 of the Education of the Handicapped Act." *Id.* § 104.3(k)(2) (1996).

[115] *Id.* § 104.3(j)(2)(ii) (1996). *See* chap. 4, pp. 94–98 (Scope of Protection) for a discussion of the analysis OCR would apply.

[116] Linda McGovern, Acting Regional Director, OCR, Region V, DOEd, letter to Foster B. Gibbs, Superintendent, School District of the City of Saginaw, Saginaw, Michigan, re: Complaint No. 15–87–1001(JB), Feb. 23, 1987, *reprinted in* 352 EHLR 413, 414 (hereafter cited as OCR Complaint No. 15–87–1001(JB), 352 EHLR 413).

[117] OCR Complaint No. 15–87–1001(JB), 352 EHLR 413, 414.

[118] OCR Complaint No. 15–87–1001(JB), 352 EHLR 415.

and, therefore, not in need of special education services."[119]

In addition to using the section 504 definition of "handicapped person" and the IDEA definition for specific learning disabilities, OCR uses professional standards as a guide in determining if eligibility criteria are discriminatory or if they deny placement to qualified students. OCR's reliance on professional standards helps to ensure that schools use criteria recognized as educationally sound by a professional education organization. It also promotes greater uniformity of eligibility criteria throughout various school districts across the country. The consistency of eligibility criteria, in turn, helps to ensure that a student who is receiving necessary special education services in one school district will not be deprived of those services in another school district because of differing eligibility criteria, a concern among scholars, researchers, and other persons.[120] Professional standards include, for example, the standards established by the American Association on Mental Deficiency for identifying students with mental retardation. Such standards often are relied upon by schools as the basis for criteria in identifying students with mental retardation.[121]

OCR, however, does not defer automatically to the school's criteria without considering if other provisions in section 504 regulations have been addressed in the school's evaluation process. For example, in one case, OCR found that the Georgia State Department of Education's eligibility criteria for specific learning disability were nondiscriminatory and in compliance with section 504 regulations. The criteria specified that specific learning disabled students currently in a program must meet a 15-point discrepancy in actual achievement and ability and that new students must meet a 20-point discrepancy.[122] Although OCR found the criteria nondiscriminatory, it sought "to ensure that the use of the severe discrepancy formula does not adversely affect individual student placement."[123] OCR recommended that a statement be disseminated to local school systems stating that "(a) all eligibility criteria for SLD must be used as guides in placement decisions; and, (b) in the event that a multidisciplinary team finds that a child has a specific learning disability, although the formula indicates that he or she does not have a severe discrepancy between achievement and performance, the team judgment must prevail."[124]

OCR's approach in these cases demonstrates responsiveness to some of the concerns raised about disability definitions. For example, where subjective factors, such as "success in the regular class," have been at issue OCR has followed the efforts of some professional organizations. It has encouraged more clarity to be included in disability definitions to better define the subjective factors. In cases where the diagnostic criteria have been challenged as too narrow, such as in the Georgia State Department of Education case, OCR has not necessarily sought changes to the definitions. Instead, it has recommended use of the definition as a guide rather than as a rule. In addition, it has encouraged schools to consider other criteria in evaluation decisions beyond a child's "fit" within the particular disability definition. This approach is in keeping with a "needs-based" focus in providing equal educational opportunity. It permits students who do not necessarily exhibit all of the characteristics defining a disability, such as a "severe discrepancy between achievement and performance," to still be considered for special education and related services, or regular education and related services. Conceptually, it acknowledges that the primary emphasis should be on identifying a student's actual needs in light of the effects of a disability, instead of a "match" between characteristics or behavior exhibited by a student to specific definitional criteria.

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[119] The student had achieved a D+ in reading, a D in English, and a D in social studies during the period when his need for special education services was being evaluated. In addition, his report card showed him to be reading below grade level. Furthermore, during the previous school year, although he was receiving C's, he was repeating the fifth grade. OCR Complaint No. 15–87–1001(JB), 352 EHLR 415.

[120] *See* pp. 124, 129 above.

[121] *See* William H. Thomas, Regional Director, OCR, Region IV, DOEd, letter to Charles McDaniel, State Superintendent, Georgia Department of Education, re: Complaint No. 04–85–1079, May 20, 1986, *reprinted in* 352 EHLR 05, 07–08 (hereafter cited as OCR Complaint No. 04–85–1079, 352 EHLR 05).

[122] OCR Complaint No. 04–85–1079, 352 EHLR 05, 08–09. The State Department of Education has relied on input from State educators and findings of a 5-year study conducted by the U.S. Department of Education's Office of Special Education and Rehabilitative Services in revising the criteria. 352 EHLR 05, 09

[123] OCR Complaint No. 04–85–1079, 352 EHLR 05, 08–09.

[124] OCR Complaint No. 04–85–1079, 352 EHLR 05, 09.

OCR's approach in the Georgia State Department of Education case also is fitting in light of some studies that have raised questions about the reliability of common definitions for learning disability. Federal law requires definitions to establish that a child shows a discrepancy between intellectual ability and intellectual achievement to classify that child as learning disabled.[125] Some studies have found that there is no conclusive evidence demonstrating a difference among children who show a discrepancy in intellectual ability and achievement and those who do not.[126]

Screening, Referral, and Diagnostic Practices

The definitions for disabilities are one factor attributed by scholars and researchers to problems with misidentification of students. A second factor identified in studies and research is problems with various screening, referral, and diagnostic practices.[127] For example, persons referring students for special education evaluations may lack the appropriate training to identify characteristics symptomatic of a disability. Although Federal law prohibits it, persons making evaluation and placement decisions may rely solely or predominantly on the results of one screening or evaluation instrument, without accounting for other factors about the student. The screening or evaluation instrument(s) relied on for decisionmaking may not account for nondisability-related factors that could affect results, such as limited proficiency in English or differences in culture. Consequently, if tests are designed with certain assumptions about its test takers, the test results may be inaccurate for a student who does not fit the assumed model. Finally, persons administering the screening or evaluation materials may improperly administer the test or other evaluation tools, actions that could result in inaccurate results. Factors such as these affect the accuracy and reliability of the process for screening and diagnosing students with disabilities, which can result in misidentification of students.

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[125] *See* chap. 2, p. 23.

[126] *See* Morison et al., *The Use of I.Q. Tests*, p. 21 (citing J.M. Fletcher, S.E. Shaywitz, D.P. Shankweiler, L. Katz, I.Y. Liberman, A. Fowler, D.J. Francis, K.K. Stuebing, and B.A. Shaywitz, "Cognitive Profiles of Reading Disability: Comparisons of Discrepancy and Low Achievement Definitions," *Journal of Educational Psychology*, vol. 86 (1994), pp. 1–18; B.R. Foorman, D.J. Francis, and J.M. Fletcher, "Growth of Phonological Processing Skills in Beginning Reading: The Lag Versus Deficit Model Revisited" (paper presented at the Society for Research on Child Development, Indianapolis, IN, March 1995); D.J. Francis, S.E. Shaywitz, K.K. Stuebing, B.A. Shaywitz, and J.M. Fletcher, "Developmental Lag Versus Deficit Models of Reading Disability: A Longitudinal Individual Growth Curves Analysis" (paper presented at the Society for Research on Child Development, Indianapolis, IN, March 1995); and K.E. Stanovich and L.S. Siegel, "Phenotypic Performance Profiles of Children with Reading Disabilities: A Regression-Based Test of the Phonological-Core Variable Difference Model," *Journal of Educational Psychology*, vol. 86 (1994), pp. 24–53). According to some researchers, data suggests that reading disability occurs on a continuum of normal reading capabilities. Ibid. (citing J.M. Fletcher, S.E. Shaywitz, D.P. Shankweiler, L. Katz, I.Y. Liberman, A. Fowler, D.J. Francis, K.K. Stuebing, and B.A. Shaywitz, "Cognitive Profiles of Reading Disability: Comparisons of Discrepancy and Low Achievement Definitions," *Journal of Educational Psychology*, vol. 86 (1994), pp. 1–18).

[127] *See* Park et al., "Cultural Biases in the Identification of Students with Behavioral Disorders," p. 15; Reynolds, "Noncategorical Special Education," p. 61 (noting that "[e]ven when criteria for placement of children in special education programs have been specified quite clearly, practices still tend to be unreliable"); The Council for Children with Behavioral Disorders, "Best Assessment Practices," pp. 263–78.

Screening Procedures

Various written, oral, and/or procedural (e.g., visual acuity exam) evaluations are administered to students from the early stages of their academic careers. Throughout the K through 12 years of schooling, virtually all students have their academic performance, social skills, and classroom behavior monitored by their teachers. In addition, students undertake numerous standardized tests that can (1) measure their growth in knowledge and skills over time, and/or within a given year, and (2) compare their ability or achievement relative to a peer group. Results obtained from any of these academic achievement and proficiency indicators, in addition to observational evaluations of students, can be used as screening devices to group students according to ability or skill mastery.[128] In addition, students' results on certain screening instruments, particularly for students who are experiencing cognitive, emotional, or behavioral problems, can reflect a possible need for adjustments or modifications to a general education curriculum in order to prevent an unneeded referral for a disability evaluation.[129] However, as stated above, parents should be informed that even while attempts are being made by the school district to alleviate an educational problem in the regular classroom, they have a right to ask the school district to evaluate their child if they suspect that the child has a disability and qualifies for services under Part B. Although the school district can advise the parents as to why it believes that an intervention program is appropriate before a Part B evaluation is conducted, the school cannot refuse to conduct an evaluation or delay it until the alternative strategies have been tried, if the school suspects the child has a disability. Results from screening devices can assist evaluators who aim to collect comprehensive data, brief facts, or descriptive and interpretive information on a student's background and performance.[130] However, among education researchers there is concern that these instruments may not be appropriate for use with culturally or linguistically diverse students.[131]

The Referral Process

Teacher referral may initiate the beginning of the formal evaluation process. Referral by a teacher is the most common way in which a student is initially identified as a potential candidate for special education services.[132] Teachers always have been the single main source of referrals, although school principals and social workers appear to be assuming a larger role since implementation of the Education for All Handicapped Children Act of 1975, now the IDEA.[133] Most students undergoing an evaluation for special education are referred by their teachers "because of repeatedly poor academic performance or poor social adjustment."[134] Before a teacher officially refers or recommends a student for individualized testing and evaluation, he or she ordinarily has observed the student's behavior and also assessed the student's academic performance.[135] In addition, the teacher will have gathered and analyzed data on observable classroom conduct, observable adaptive behavior (which includes interpersonal skills and relationships established with fellow students), scholastic performance, information on students' sociocultural background (e.g., data related to family socialization practices, such as the types of social relationships within the extended family), and language skills and preferences.[136]

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[128] James Kulik, *An Analysis of the Research on Ability Grouping: Historical and Contemporary Perspectives* (Storrs, CT: National Research Center on the Gifted and Talented, February 1992), p. 2.

[129] James McKinney et al., "Educational Assessment of Students with Attention Deficit Disorder," *Exceptional Children*, vol. 60, no. 2 (October 1993), p. 136 (hereafter cited as McKinney et al. "Educational Assessments of Students with ADD").

[130] Waterman, "Assessing Children for the Presence of a Disability," p. 13.

[131] *See* ibid., p. 13 (citing C. Hoy and N. Gregg, *Assessment: The Special Educator's Role* (Pacific Grove, CA: Brooks/Cole, 1994); C.S. Lidz, ed., *Dynamic Assessment: An Interactional Approach to Evaluating Learning Potential* (New York: Guilford, 1987); Beth Harry, *Cultural Diversity, Families, and the Special Education System: Communication and Empowerment* (New York: Teachers College Press, 1992)).

[132] *See* Morison et al., *The Use of I.Q. Tests*, p. 13 (quoting Donald L. Macmillan, "The Role of I.Q. in Eligibility and Placement Decisions for Children in Special Education" (paper presented at a workshop of the Board on Testing and Assessment, La Jolla, CA, Jan. 21, 1995) (Washington, DC: National Academy Press, forthcoming)).

[133] Pub. L. No. 101–476, 104 Stat. 1143 (codified as amended at 20 U.S.C. §§ 1400–1485 (1994), *amended by* the IDEA Amendments of 1997, Pub. L. No. 105–17). *See* Heller et al., *Placing Children in Special Education*, p. 38. *See, e.g.*, Mass. Regs. Code tit. 110, § 7.403(1) (1996) ("Whenever it appears to a Department social worker that a child is in need of special education services, the worker shall refer the child, in writing, to the child's LEA for evaluation and services.").

According to various scholars and researchers, the teacher referral process can be highly subjective in nature because teachers use their own judgment in referring students with which they have experience.[137] This is particularly true for emotional and behavioral disabilities and mental retardation, which rely on the identification of certain subjective characteristics in a student, such as inappropriate behavior or feelings or deficits in adaptive behavior. Often referral by a teacher is the first and most complete screen for identifying such characteristics.[138] Because these characteristics are often vague and undefined, teachers frequently must rely on cultural norms and their own subjective judgments for determining when behaviors or feelings are inappropriate or when adaptive behavior is lacking. Given the subjectivity involved in this evaluation, some scholars contend that cultural values, beliefs, and expectations tend to be highly influential factors.[139] In fact, various studies have shown that (1) many teachers have different expectations of how students should conduct themselves and perform academically in class, (2) teacher judgments can be influenced by factors such as the student's race, attractiveness, noticeability, interactions with teachers, and linguistic differences,[140] and (3) teachers may not be aware of the subtle differences in expectations and behaviors they exhibit.[141] According to some scholars, the implications can lead to inadvertent misidentifications and inappropriate referrals of students because of the teachers' own expectations and beliefs and their own behaviors toward the students.[142]

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[134] Heller et al., *Placing Children in Special Education*, p. 38. *See also* Morison et al., *The Use of I.Q. Tests*, p. 10; McKinney et al., "Educational Assessments of Students with ADD," p. 135.

[135] Thomas Oakland, ed., *Psychological and Educational Assessment of Minority Children* (New York: Brunner/Mazel, Publishers, 1977), p. 150 (hereafter cited as Oakland, *Psychological and Educational Assessment*).

[136] Ibid., p. 151.

[137] *See* Park et al., "Cultural Biases in the Identification of Students with Behavioral Disorders," p. 15 (citing J. Paul and B. Espanchin, *Emotional Disturbance in Children* (Columbus, OH: Merrill, 1982); Heller et al., *Placing Children in Special Education*, p. 19.

[138] *See* Morison et al., *The Use of I.Q. Tests*, p. 13 (quoting Donald L. Macmillan, "The Role of I.Q. in Eligibility and Placement Decisions for Children in Special Education" (paper presented at a workshop of the Board on Testing and Assessment, La Jolla, CA, Jan. 21, 1995) (Washington, DC: National Academy Press).

[139] *See* Sharon Ishii-Jordan and Reece L. Peterson, "Behavioral Disorders in the Context of Asian Cultures," in Reece L. Peterson and Sharon Ishii-Jordan, *Multicultural Issues in the Education of Students with Behavioral Disorders* (Cambridge, MA: Brookline Books, 1994), p. 111 (hereafter cited as Ishii-Jordan and Peterson, "Behavioral Disorders").

[140] Paul E. Carlson and Thomas M. Stephens, "Cultural Bias in Identification of Behaviorally Disordered Children," *Behavioral Disorders*, vol. 11 (1987), pp. 191–98; Mary E. Franklin, "Culturally Sensitive Instructional Practices for African-American Learners with Disabilities; Issues in the Education of African-American Youth in Special Education Settings," *Exceptional Children*, vol. 59, no. 2 (October 1992), p. 115 (hereafter cited as Franklin, "Culturally Sensitive Instructional Practices"); Ishii-Jordan and Peterson, "Behavioral Disorders," p. 111 (citing J.E. Brophy and C.M. Evertson, *Student Characteristics and Teaching* (New York: Longman, 1981); J.E. Brophy and T.L. Good, "Teachers' Communication of Differential Expectations for Children's Classroom Performance: Some Behavioral Data," *Journal of Educational Psychology*, vol. 61, no. 5 (1970), pp. 365–74; and T.L. Good and J.E. Brophy, "Behavioral Expression of Teacher Attitudes," *Journal of Educational Psychology*, vol. 63 (1972), pp. 617–24).

This is not to say that teacher referrals are not useful in the process of screening and diagnosing students. Studies point to many benefits of teacher input when identifying a student's special education needs. For example, one study finds that teacher judgment is a good means of predicting a student's future need for special education services. According to the study, a primary reason for the predictive success of teacher judgments is that, unlike standardized tests which assess only a narrow range of skills,[143] teacher judgments rely on several components relating directly to performance in the class. Teachers are able to view the student's ability in relation to other students in the same class. They are able to judge the student's current competence in terms of how the student has mastered grade-appropriate skills and ability to function in the classroom. In addition, teachers can assess the students in terms of the teaching time and resources required to teach the child. Further, unlike standardized tests, which focus on the student's performance at one point in time, teacher judgments are based on an extended history with the student.[144]

Another study points out that teachers are "sufficiently skilled as 'disability detectors.'"[145] It also points out that teachers are in a strategic position for basing their identification decisions on the student's observed behavior in the setting where the student experiences the learning problems, and that teacher referral provides evidence of the likelihood that the student will be unable to benefit instructionally in that teacher's classroom. That study, however, cautions that consistent with Federal law teacher referrals should not be the sole or primary criterion for determining whether a child has a disability and needs special education and related services.[146] Therefore, it seems that the key to eliminating some of the bias and subjectivity of the teacher referral process, is to (1) better understand the causes of particular disabilities and the characteristics observed in the child, and (2) ensure that several criteria, in addition to the teacher referral, are considered in the evaluation process.

Prereferral Intervention Strategies

Many of the Nation's school systems recommend or require that, prior to referring a student for an evaluation to identify whether the student has a disability, the regular education teacher, possibly with assistance from colleagues, assess the nature of the student's cognitive and/or behavioral difficulty and determine what possible modifications to instruction and the classroom can be made.[147] The aim of these intervention[148] strategies is to reduce inappropriate referrals to and placement in special education programs; improve efficiency in use of education resources and personnel; and promote collaboration between special and regular education teachers.[149]

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[141] Ishii-Jordan and Peterson, "Behavioral Disorders," p. 111 (citing J.E. Brophy and C.M. Evertson, *Student Characteristics and Teaching* (New York: Longman, 1981); J.E. Brophy and T.L. Good, "Teachers' Communication of Differential Expectations for Children's Classroom Performance: Some Behavioral Data," *Journal of Educational Psychology*, vol. 61, no. 5 (1970), pp. 365–74; and T.L. Good and J.E. Brophy, "Behavioral Expression of Teacher Attitudes," *Journal of Educational Psychology*, vol. 63 (1972), pp. 617–24). *See also* Park et al., "Cultural Biases in the Identification of Students with Behavioral Disorders," p. 15; Franklin, "Culturally Sensitive Instructional Practices," p. 115 (discussing research that has found that language and dialectical differences affect communication and interaction between the teacher and learner).

[142] *See* Ishii-Jordan and Peterson, "Behavioral Disorders," p. 111; Mary Wagner, "Outcomes for Youths with Serious Emotional Disturbance in Secondary School and Early Adulthood," *Critical Issues for Children and Youth*, vol. 5, no. 2 (Summer/Fall 1992), p. 95 (citing Beth Harry, *Cultural Diversity, Families, and Special Education Systems: Communication for Empowerment* (New York: Teachers College Press, 1992)).

[143] J. Michael Coleman and G. Michael Dover, "The RISK Screening Test: Using Kindergarten Teachers' Ratings to Predict Future Placement in Resource Classrooms," *Exceptional Children*, vol. 59 (March 1993), p. 493.

[144] Ibid.

[145] Harvey F. Clarizio, "Teachers as Detectors of Learning Disability," *Psychology in the Schools*, vol. 29 (January 1992), p. 28 (hereafter cited as Clarizio, "Teachers as Detectors of Learning Disability").

[146] Ibid., pp. 28–29, 34–35. Clarizio notes, "Reliance on teacher judgment as to sole or primary criterion on eligibility as LD would result in far more errors (false positives) than would be acceptable." Ibid., p. 33.

Prereferral intervention procedures are based on results of various research studies that showed evidence of inappropriate referrals for disability evaluations, especially the overreferral of students who were from backgrounds that were culturally or linguistically different from the majority culture, of those who were difficult to teach, and of those who were felt to have behavioral problems.[150] Some of those studies that were conducted in the late 1980s revealed that early education intervention efforts were essential for addressing problems facing at-risk students,[151] as well as for reducing the likelihood of inappropriate diagnoses of suspected disabilities and unnecessary future referrals to special education programs.[152]

Results on screening instruments administered to students who have experienced educational and/or behavioral difficulties and who are suspected of having disabilities, can reflect the need for their regular education teacher to implement accommodations, adjustments, and modifications to regular education curricula, methods of instruction, and/or classrooms.[153] The education practice of implementing these prereferral intervention strategies reflects a school's acknowledgement that numerous variables (e.g., classroom, teacher, and interaction of these) affect learning, and that the student is not solely responsible for his or her academic or behavioral difficulties.[154]

Some education researchers encourage schools to document the modifications to the regular education teacher's approach to the classroom or to student activities. The researchers claim that keeping track of the specific modifications attempted with a given student who is suspected of having a disability is useful. The data can provide critical information to an official evaluation team if the student is eventually referred for an evaluation for a possible disability. In addition, according to some education researchers, as modifications are being implemented into the regular classroom, the teacher should monitor the impact of these alterations by continuously observing the student and analyzing how he or she behaves and interacts verbally in response to various changes in the education setting.[155] In addition, teachers can also determine the most effective methods of instruction and determine if the prereferral intervention strategies address student needs.[156] If no progress is made within a specific amount of time (e.g., 6 months[157]), then the student can be referred for an individualized evaluation.[158]

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[147] Waterman, "Assessing Children for the Presence of a Disability," p. 5; Ysseldyke and Algozzine, *Special Education*, p. 165.

[148] The term "intervention" refers to "any systematic attempt to alter the course of development from either its established or predicted path." *See* Lisbeth and Daniel Schorr, *Within Our Reach: Breaking the Cycle of Disadvantage* (New York: Doubleday, 1988), p. 31.

[149] Maryann Roth et al., "Who Becomes an 'At-risk' Student: The Predictive Value of a Kindergarten Screening Battery?" *Exceptional Children*, vol. 59, no. 4 (February 1993), p. 348 (hereafter cited as Roth et al., "At Risk").

[150] Waterman, "Assessing Children for the Presence of a Disability," p. 5.

[151] Roth et al., "At Risk," pp. 348–49.

[152] Waterman, "Assessing Children for the Presence of a Disability," p. 5. The author does not address the specific programs, adjustments in the classroom, or the modifications to instruction used for students exhibiting behavioral and/or cognitive difficulties.

[153] McKinney et al., "Educational Assessments of Students with ADD," p. 136.

[154] Waterman, "Assessing Children for the Presence of a Disability," p. 5.

[155] Ibid., pp. 5, 13.

[156] Ibid., p. 13.

There are various situations in which a knowledgeable intervention can avoid the inappropriate referral of a student for an evaluation of disability and actually promote an improved learning climate for students with educational problems.[159] Education researchers contend that outcomes of students can be improved "if professionals who work with intervention strategies and advocates who promote their cause have a clear understanding of the interventions that work well, when they are effective, and under which set of circumstances."[160]

However, the willingness of regular education teachers to make accommodations, adjustments, and modifications to their curriculum or methods of instruction, or provide students with additional assistance, cannot be readily assumed. There are frequent references by professionals that some students, particularly those who are linguistically or culturally diverse, are "retested" until they qualify for special education programs.[161] This strategy is based on the theory that removing students from the regular education classroom can promote better educational opportunities for these students. Some regular education teachers may not judge themselves as qualified to provide the necessary interventions for particular students who may be exhibiting behavioral and/or academic difficulties. However, some education researchers claim that teacher inability to modify instructional programs may reflect an unwillingness to retain and integrate in their classrooms students who may be unlike the norm.[162]

Evaluation Process

Comprehensive evaluation for educational purposes is an ongoing, multistage process of gathering data and information to make decisions about the nature of children's educational problems and their needs for specialized programs and services. The evaluation process is the administration of evaluation methods that seek to confirm whether a suspected disability exists,[163] and whether the child needs special education and related services. It is not limited to providing an official diagnosis of a student's disability or academic difficulty. A thorough evaluation also should provide information for instructional decisions or planning and research.[164]

To determine the presence of a disability and its implications on a student's educational needs, various observers and educators[165] should compile detailed information about a student and how he or she functions and behaves in diverse settings or locations (e.g., home, school classroom, playground, chorus) for different situations (e.g., how a child responds during reading or lunch) at various times (e.g., morning, afternoon, and night). Information to confirm the existence and

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[157] McKinney et al., "Educational Assessments of Students with ADD," p. 133.

[158] Waterman, "Assessing Children for the Presence of a Disability," p. 5.

[159] William Ellis and Shirley Cramer, *Learning Disabilities: A National Responsibility. Report of the Summit on Learning Disabilities* (New York: National Center for Learning Disabilities, Inc., 1995), p. 3 (hereafter cited as Ellis and Cramer, *Learning Disabilities Summit*).

[160] Ibid., p. 11.

[161] Ibid., p. 6.

[162] Ibid.

[163] McKinney et al., "Educational Assessments of Students with ADD," pp. 136, 140.

[164] Waterman, "Assessing Children for the Presence of a Disability," p. 8.

[165] Members of the multidisciplinary team include psychologists, therapists, special educators, and other professionals. *See* Carolyn Olivier and Rosemary Bowler, *Learning to Learn* (New York: Simon and Schuster, 1996), pp. 158–61.

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severity level of a disability must be collected from multiple sources (e.g., parents, teachers) using various methods (e.g., rating scales, observations, interviews).[166] By law, the process should not be limited to one evaluation instrument, such as an individual standardized test score.[167]

Educators may be tempted by the convenience and plentiful nature of standardized tests to administer a battery of tests to a student and base a disability diagnosis on the results.[168] Although tests can define the areas in which a student may be performing below his or her peers and indicate the presence of a disability and its level of severity, tests are limited. Tests alone will not give the comprehensive picture of how a child performs or what he is or is not able to do, and results are not always useful for instructional planning purposes.[169] According to one education scholar, evaluators need to use a variety of tools and approaches in multiple settings to assess a student suspected of a disability.[170] These tools and approaches can include rating scales, checklists, observational recordings, parent/teacher interviews, social competence evaluations, emotional or social adjustment scales, and behavioral evaluations.[171] The use of these additional instruments can assist educators in determining particular instruction or curricular changes that may benefit the child.[172] Some of these evaluation tools and approaches are discussed below.

Testing Generally

Testing can be used as a tool in the evaluation process. Testing is the administration of specifically designed and often standardized educational and psychological measures of behavior. Tests may be developed within the school, such as by the classroom teacher. Tests also may be commercially developed; these tests include standardized tests. Standardized tests usually have detailed procedures for administering, timing, and scoring.[173]

Standardized tests are "norm-referenced." Although criterion-referenced tests are scored according to a standard or criterion that the teacher, school, or test publisher decides represents the acceptable level of mastery, they are not typically considered "standardized" tests, unless they are also norm-referenced. If these tests target certain skills, such as spelling, they are sometimes called content-referenced tests.[174] With norm-referenced tests, scores are not interpreted according to an absolute standard or absolute criteria (e.g., 75 percent of responses correct), but rather according to how the student's performance compares with that of a particular group of individuals. For the comparison to be meaningful and valid, the norm group must be defined and be large enough to form a representative sample of all the students being assessed (with respect to age, gender, socioeconomic status, race or ethnicity) from each geographic area. Information is usually available from the test publisher about how various types of children perform on the evaluation. Evaluators in a given school district or school can compare the scores of children being evaluated to the scores from the norm group, and thereby determine if any given student is performing at below, above, or similar to the level expected of him or her given age, ethnicity, socioeconomic status, etc.[175]

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[166] McKinney et al., "Educational Assessments of Students with ADD," p. 137; Waterman, "Assessing Children for the Presence of a Disability," pp. 5–6.

[167] According to Pub. L. No. 105–17, § 612(a)(6)(B) (1997), 34 C.F.R. § 300.532(d) (1996), and 34 C.F.R. § 104.35(b)(2) (1996), no single procedure may be used as the sole criterion for determining a child's eligibility for special education services.

[168] Waterman, "Assessing Children for the Presence of a Disability," p. 4 (col. 1).

[169] Ibid., pp. 7–9.

[170] Ibid., p. 7.

[171] McKinney et al., "Educational Assessments of Students with ADD," p. 135; Olivier and Bowler, *Learning to Learn*, p. 154; Waterman, "Assessing Children for the Presence of a Disability," p. 20.

[172] Waterman, "Assessing Children for the Presence of a Disability," pp. 6, 9.

[173] Ibid., pp. 2, 7.

[174] An example of a content-referenced test is a teacher-made spelling test where there are 20 words to be spelled and where the teacher has defined the acceptable level of mastery as 16 correctly spelled words or 80 percent. Ibid., p. 7.

If norm-referenced tests are used with students who were not fairly represented in the norming sample the accuracy, reliability, validity, and meaningfulness of the results will be questionable,[176] a particular concern to black, Hispanic, and Asian American children and youth.[177] Some researchers say that when the performance of a student is being compared to the norm sample group, it is assumed that the youngster had opportunities to acquire the skills and knowledge of those in the sample norm group.[178] However, a student who is a newcomer to United States, who is not familiar with the nuances and idioms of the English language, may not have been exposed in his or her native culture to the required information; he or she may not have the appropriate tools or skills needed to acquire the critical knowledge on which the standardized tests are based.[179] As a result, the test results may not provide accurate information or be able to reveal what students really know. These students, in turn, could be erroneously referred for evaluations if their teachers attribute their performance on standardized tests to disabilities.[180]

A common reason why teachers and other evaluators rely on standardized tests is that they are convenient and plentiful. A school may find it most convenient to administer a group of tests to a student to assess whether the student has a disability.[181] Before doing so, however, a school must ensure that the tests are both reliable and valid. Reliability refers to the degree to which a child's results on the test are the same or similar over repeated testing. "If a test is not reliable or if its reliability is uncertain—meaning that it does not yield similar results when the student takes the test again—then it should not be used." Validity is the degree to which the test measures what it claims to measure.[182]

A 1996 report entitled *The Use of I.Q. Tests in Special Education Decision Making* states, "An important maxim of appropriate test use is that no single test score should be used to make decisions about individuals."[183] Researchers have identified several reasons why schools should not rely on test scores as the sole basis of evaluation. First, test results do not provide a comprehensive picture of how the student performs and what he or she knows.[184] For example, standardized tests assess only a narrow range of skills that are thought to be a prerequisite to academic achievement;[185] they do not reflect all of the student's skills and abilities. Second, a test may not be appropriate to evaluate a particular student's difficulties and, therefore, produce misleading or inaccurate information.[186] For example, many tests fail to explore pupils' cognitive processes and guide the development of instruction for students.[187] Because many standardized tests do not reflect the curriculum being taught, the results do not reflect what the student really knows.[188] Third, tests which are not administered properly will not provide an accurate reflection of the student's ability in the tested skill. Fourth, examiners may not have proper training in the selection of appropriate tests, or they may inaccurately administer and score tests.[189] Despite these problems and Federal law to the contrary, studies have shown that testing is frequently a sole or primary determinant in the evaluation of students for special education services.[190]

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[175] Ibid.

[176] Ibid.; Park et al., "Cultural Biases in the Identification of Students with Behavioral Disorders," p. 16. Problems that have been attributed to norm-referenced evaluation include: (1) the procedures are not objective or relevant to classroom settings; (2) there is an overemphasis on middle-income families; (3) the cognitive styles sampled in the norm group frequently are opposed to those generally encountered in low-income families; and (4) norm-referenced testing is couched on the belief that academic and behavioral problems occur in children because there is something wrong with them. Waterman, "Assessing Children for the Presence of a Disability," p. 7.

[177] Waterman, "Assessing Children for the Presence of a Disability," p. 7.

[178] Peterson and Ishii-Jordan, "Multicultural Education," p. 16.

[179] Waterman, "Assessing Children for the Presence of a Disability," p. 13.

[180] Ibid.

[181] *See* ibid., p. 4.

[182] Ibid., p. 8.

[183] Morison et al., *The Use of I.Q. Tests*, p. 5.

[184] Waterman, "Assessing Children for the Presence of a Disability," p. 4. *See also* Coleman and Dover, "The RISK Screening Test," p. 493 ("static measures. . . represent a behavioral snapshot of the child at one point in time. . .").

Intelligence Tests

Intelligence tests purport to measure a number of factors associated with intellect and the ability to think itself. These include levels of thinking abilities, language skills, perceptual organization abilities, spatial abilities, processing speed, and the use of thinking ability in making social judgments. I.Q. tests may be administered individually or to a group. Individual I.Q. tests are personal in that the tester "gets to know the examinee, interacts so as to encourage a good performance, observes how the person approaches tasks and responds to frustration, and usually prepares a personalized interpretation."[191] Because group tests of intelligence are not personal, they should not be used to determine a child's eligibility for special education.[192]

According to a 1996 report on the use of I.Q. testing, individual I.Q. tests are used most frequently by schools to determine a student's eligibility for special education services for mental retardation and learning disabilities. They are seldom used in planning instruction for the student.[193] The report notes that "[m]any States and [school] districts require the use of I.Q. tests because they are considered essential to the diagnosis of learning disabilities and mental retardation."[194] In most States, school psychologists, who have special training in test administration and interpretation, are responsible for I.Q. testing. I.Q. tests assist in distinguishing between students who have learning disabilities, students who have mental retardation, and students who perform at low achievement levels but who do not meet the definition of learning disabled or mentally retarded.[195] A primary delineating characteristic among these three categories is the level of intellectual ability, as reflected by I.Q. scores.

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[185] Coleman and Dover, "The RISK Screening Test," p. 493.

[186] Waterman, "Assessing Children for the Presence of a Disability," p. 8.

[187] Mary G. Anderson, "Perceptions About Behavioral Disorders in African-American Cultures and Communities" in Reece L. Peterson and Sharon Ishii-Jordan, *Multicultural Issues in the Education of Students with Behavioral Disorders* (Cambridge, MA: Brookline Books, 1994), p. 96 (citing D. Fuchs, L. Fuchs, S. Bernowitz, and K. Barringer, "Norm-Referenced Tests: Are They Valid for Use with Handicapped Students?" *Exceptional Children*, vol. 54, no. 3 (1987), pp. 263–71); Waterman, "Assessing Children for the Presence of a Disability," p. 9.

[188] Waterman, "Assessing Children for the Presence of a Disability," p. 9.

[189] Anderson, "Perceptions About Behavioral Disorders," p. 96 (citing D. Fuchs, L. Fuchs, S. Bernowitz, and K. Barringer, "Norm-Referenced Tests: Are They Valid for Use with Handicapped Students?" *Exceptional Children*, vol. 54, no. 3 (1987), pp. 263–71); Waterman, "Assessing Children for the Presence of a Disability," p. 9.

[190] *See generally* Moecker, *Anglo and Hispanic*.

[191] Morison et al., *The Use of I.Q. Tests*, p. 5, note 1 (quoting L. Cronbach, *Essentials of Psychological Testing* (New York: Harper Collins, 1990), p. 243). The dominant individual I.Q. test used with children is the Wechsler Intelligence Scales (WPPSI; WISC–III). There are a number of other individual I.Q. tests, such as the Stanford Binet Intelligence Scale and the Kaufman Assessment Battery for Children. Ibid. *See also* Gearheart, *Special Education for the '80s*, p. 265.

[192] Morison et al., *The Use of I.Q. Tests*, p. 5, note. 1; Waterman, "Assessing Children for the Presence of a Disability," p. 8.

[193] Morison et al., *The Use of I.Q. Tests*, pp. 5, 14.

[194] Ibid., p. 3.

Criticisms of individual I.Q. tests mirror the concerns expressed about standardized testing generally. First, I.Q. test scores provide only an estimate, at one point in time, of the level of an individual's performance; they do not reliably measure potential.[196] Second, I.Q. tests rely on several assumptions that may not be true for every student tested. I.Q. tests assume (1) that the student being tested is performing at his or her best; (2) that the student understands what is expected; and (3) that the student is willing to comply with the examiner's instructions and the testing directions.[197] Third, I.Q. measures, in many cases, are not based on a learning model.[198] For example, they do not test a student's reading or writing abilities based on what the student has been learning to read or write in class.

There has been a longstanding controversy about the validity and use of I.Q. testing.[199] Criticisms have focused on the extent to which the I.Q. test is a good and accurate measure of intelligence and ability. One of the main arguments contends that I.Q. tests have been racially or culturally biased.[200] The reliability, validity, and fairness of the intelligence test are clearly questionable with respect to students not familiar with the content and skills stressed in America's schools and those who are limited English proficient.[201] Some education researchers assert that concerns such as these necessitate testing of students in their native language, specialized training prior to administering a standardized test, and reliance on more than one specific standardized test score as an indicator for disability evaluation referrals.[202]

There have been other concerns expressed about the validity of I.Q. tests such as questions about the use of I.Q. tests on individuals with multiple disabilities. In addition, there have been concerns about the value implications and social consequences of test interpretation and use.[203] For example, a predominantly held notion of the

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[195] Mental retardation usually is viewed as low achievement combined with below-average general intellectual ability. Learning disabilities commonly are viewed as unexpected low performance or low achievement of a child with normal or above-average general intellectual ability. The third category comprises students who perform at low achievement levels, but whose intellectual abilities are neither high nor low enough to meet the definitions of mental retardation or learning disability. These students often have been categorized as "slow learners" or "low achievers," and, often, they are assigned to remedial classes or compensatory education programs. Ibid., pp. 10–11, 20, box 4.

[196] Ibid., p. 6 (citing R.E. Snow, "Validity of I.Q. as a Measure of Cognitive Ability" (paper presented at a workshop of the Board on Testing and Assessment, La Jolla, CA, Jan. 21, 1995) (Washington, DC: National Academy Press, forthcoming)); H. Lee Swanson, "Operational Definitions and Learning Disabilities: An Overview," *Learning Disabilities Quarterly*, vol. 14 (Fall 1991), p. 247.

[197] Morison et al., *The Use of I.Q. Tests*, p. 6 (citing R.E. Snow, Validity of I.Q. as a Measure of Cognitive Ability" (paper presented at a workshop of the Board on Testing and Assessment, La Jolla, CA, Jan. 21, 1995) (Washington, DC: National Academy Press, forthcoming)).

[198] Swanson, "Operational Definitions," p. 247.

[199] *See* U.S. Commission on Civil Rights, *The Validity of Testing in Education and Employment* (May 1993) (hereafter cited as U.S. Commission on Civil Rights, *The Validity of Testing*); Heller et al., *Placing Children in Special Education*, pp. 48–58.

[200] *See* Morison et al., *The Use of I.Q. Tests, p. 6.*

[201] Waterman, "Assessing Children for the Presence of a Disability," p. 15.

[202] Ibid.

[203] Morison et al., *The Use of I.Q. Tests*, p. 6.

I.Q. is that it is "a fixed, predetermined amount that somehow limits one's options and predicts future success." However, a student's abilities may vary based on differences in educational settings and instructors. Currently there is no evidence of the capacity of I.Q. tests to predict how a student with a specific I.Q. score profile will respond to different kinds of special education treatments.[204] Based on these concerns and the overall controversy about I.Q. testing, there are lingering questions about the use of I.Q. testing in identifying and placing students with disabilities. The use of I.Q. testing in special education evaluations and placement decisions is of major concern given that schools have frequently relied heavily on I.Q. tests as the primary or even the sole determinant of whether a student requires special education services.[205]

It should be noted that I.Q. tests, when they are administered properly and are not used as the sole determinant of whether a student requires special education services, can serve useful purposes as evaluation tools in educational programs. One example of the vindication of I.Q. testing for certain specific education purposes was a California court case involving black parents who wanted I.Q. testing to prove that their children did not belong in special education.[206] California refused to administer the test pursuant to a Federal court order issued in the case of *Larry P. v. Riles*[207] and expanded in 1986. In the case of *Crawford v. Honig*,[208] the parents of black students alleged that California could not refuse to provide I.Q. testing to their children when they had requested it, and the test was available to other children including white students. In 1992 a Federal court in California reversed a ban on I.Q. testing in the State of California for evaluation, admission, and placement of black school children with learning disabilities or mental retardation.[209] In addition, other commentators have made cogent arguments for the usefulness of I.Q. testing in educational programs.[210]

Observations

Observations of a student in various environments, particularly the classroom and during various situations (e.g., participating in a reading group, taking a test, writing an essay) can offer useful information about (1) his or her academic, communication, sensory-motor, and social skills; (2) behaviors that hinder or are conducive to learning; and (3) factors within the particular setting that influence his overall attitude and well-being. During observations, assessors look for cues to specific behaviors and characteristics.[211] With students suspected of having a disability such as ADHD, behaviors such as inattention, impulsiveness, and hyperactivity may be situational (e.g., displayed at school but not at home, or only in some school or home situations). Observers can examine the various aspects of these

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[204] Ibid., p. 7 (citing R.E. Snow, "Validity of I.Q. as a Measure of Cognitive Ability" (paper presented at a workshop of the Board on Testing and Assessment, La Jolla, CA, Jan. 21, 1995) (Washington, DC: National Academy Press, forthcoming)).

[205] *See* ibid., p. 2 (discussing *Larry P. v. Riles*).

[206] *See* Jean Merl, "Court Ban on I.Q. Tests for Blacks Sparks Parents' Suit," *The Los Angeles Times*, Aug. 5, 1991.

[207] 495 F. Supp. 926 (N.D. Cal. 1979) *aff'd in part and rev'd in part*, 793 F.2d 969 (9th Cir. 1984).

[208] No. 89–0014–RFP (N.D. Cal. May 10, 1988). *See* U.S. Commission on Civil Rights, *The Validity of Testing, p. 189*.

[209] *See* "Judge Lifts Ban on I.Q. Testing," *The Washington Times*, Sept. 3, 1992; and "Judge Lets California Resume I.Q. Testing of Black Students," *Education Daily*, Sept. 8, 1992, p. 4.

[210] *See generally* U.S. Commission on Civil Rights, *The Validity of Testing*.

[211] Waterman, "Assessing Children for the Presence of a Disability," pp. 5–6.

"on and off" behaviors associated with particular disabilities.[212]

Common observational techniques include recording of information based on observations,[213] completion of checklists,[214] and noting observations by rating scales.[215] Observational instruments can be useful in assessing "on and off" behaviors, which are typical symptoms of certain disruptive disorders. The instruments can be used to measure the impact of the disorder's symptoms on academic performance, as well as to help plan and monitor the effectiveness of instructional and/or behavioral accommodations.[216] To improve reliability of observation techniques, evaluators may need to assess a student at different times in each of the integral settings.[217]

Although observations can be useful methods of evaluation, education researchers have expressed concerns that observations can lead to misidentification of students. Observational methods, such as completion of checklists and rating scales, are extremely subjective.[218]

For example, one process for identifying ADHD is based on a checklist of symptoms listed in the American Psychiatric Association's 1994 *Diagnostic and Statistical Manual of Mental Disorder*, or DSM–IV, which states that it is difficult to establish a diagnosis of ADHD in children younger than age 4 or 5 years.[219] For a diagnosis, the DSM–IV requires evidence of the persistence of symptoms for at least 6 months.[220] The severity of the disorder is determined by the number of symptoms that exceed a threshold of six symptoms.[221]

According to researchers, this process has the potential to improperly evaluate students because the same threshold number of symptoms and behavioral description of symptoms apply uniformly to students of all age levels and both sexes. The checklist method used in the DSM–IV is likely to overidentify younger children because they often exhibit ADHD symptoms due to their young age and maturity level, not due to a disorder. The process also is likely to underidentify female students, who typically present few symptoms but may be as educationally impaired as male students.[222]

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[212] McKinney et al., "Educational Assessments of Students with ADD," p. 133.

[213] The observer may (1) describe in narrative form specific incidents or behaviors (anecdotal records); (2) record how many times the student exhibits specific behavior (event recording); (3) measure how much time a student spends doing something (duration recording); or (4) count the number of times a behavior occurs during a specific time interval (time-sampling recording). Waterman, "Assessing Children for the Presence of a Disability," p. 6.

[214] A checklist usually requires the observer to note whether a particular characteristic is present or absent. Ibid.

[215] A rating scale typically asks the observer to note the degree to which a characteristic is present or how often a behavior occurs. Ibid.

[216] McKinney et al., "Educational Assessments of Students with ADD," p. 133.

[217] Waterman, "Assessing Children for the Presence of a Disability," p. 6.

[218] *See, e.g.*, Robert G. Simpson, "Agreement Among Teachers of Secondary Students in Using the Revised Behavior Problem Checklist to Identify Deviant Behavior," *Behavioral Disorders*, vol. 17, no. 1 (November 1991), p. 71 (noting that rating the behavior of children remains an extremely subjective activity).

[219] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition (Washington, D.C.: American Psychiatric Association, 1994), p. 81 (hereafter cited as APA, DSM–IV).

[220] *See* ibid., pp. 83–84.

[221] *See* ibid.

[222] *See* ibid., p. 82. *See also* McKinney et al., "Educational Assessments of Students with ADD," p. 125 (citing R.A. Barkley, "A Critique of Current Diagnostic Criteria for Attention Deficit Hyperactivity Disorder: Clinical and Research Implications," *Developmental and Behavioral Pediatrics*, vol. 11 (1990), pp. 343–52). *See* Maag and Reid, "Attention-Deficit Hyperactivity Disorder: A Functional Approach," p. 6 (noting that "all of the behaviors symptomatic of ADHD, like other behavior disorders,

Because of these problems, the DSM–IV emphasizes that "most parents first observe excessive motor activity when the children are toddlers . . . [u]sually the disorder is first diagnosed in elementary school years when school adjustment is compromised."[223] Teachers and parents are therefore best sources of data when using observation methods.[224] Since parents and teachers are most familiar with a student's behavior, they can most accurately describe the degree to which a student displays certain symptoms. Independent rating scales have been developed that supplement the DSM symptoms checklist method by quantifying the degree of each behavioral symptom. On one rating scale, parents and teachers rate a student's behavioral symptoms on a four-point scale ranging from "not at all" to "very much."[225] However, as with teacher referrals, researchers note that there can be much subjectivity in the process and, thus, a potential for bias.[226] If the observer has certain expectations of how a student should behave or act, his or her recordings and evaluations may be inaccurate or unreliable.[227]

Summary

Various screening, referral, and diagnostic practices can impede neutral and nondiscriminatory identification and evaluation processes. The problems stemming from these practices demonstrate that, prior to the screening or evaluation of students, there must be a good understanding of the various disabilities and how they are manifested, there must be proper training in the administration of screening or evaluation methods, and there must be proper training in the benefits and implementation of prereferral intervention strategies. Such efforts help to ensure that students are accurately identified; that they receive the proper services to meet their individual needs; and that they ultimately receive an equal opportunity to education. In enforcing section 504, OCR has strived to address many of the issues in the screening and diagnostic practices that pose barriers to a neutral and nondiscriminatory identification process. OCR's efforts in this area are discussed below.

Screening, Referral, and Diagnostic Practices: OCR's Enforcement Efforts

OCR's General Approach

Because of the problems associated with misidentification, OCR has worked to ensure proper identification, evaluation, and placement of students. For example, OCR has addressed, proactively, issues such as testing and evaluation and the overrepresentation of minority students in special education. Targeting these and other issues as priorities, it has made a commitment to devote 80 percent of its proactive resources to issues such as these.[228] Results of this planning initiative, thus far, have been a wide number of activities, including policy development, compliance reviews, technical assistance, and outreach and education.

In terms of major policy development and guidance, OCR has produced a comprehensive policy memorandum, issued on July 6, 1995, that focuses on the issue of minority students in special education. This policy memorandum ("Minority Students and Special Education" policy) is com-

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may be displayed by 'normal' children during various stages of development").

[223] APA, DSM–IV, p. 82.

[224] McKinney et al., "Educational Assessments of Students with ADD," p. 125.

[225] Ibid. (citing J. Swanson and W. Pelham, "A rating scale for the diagnosis of attention deficit disorders: Teacher norms and reliability" (unpublished manuscript, University of Pittsburgh, Western Psychiatric Institute, 1988); and G.J. DuPaul, "Parent and teacher ratings and ADHD symptoms: Psychometric properties in a community-based sample," *Journal of Clinical Child Psychology*, vol. 20 (1991), pp. 245–53).

[226] Wood, "Issues in the Education of Behaviorally Disordered Students," p. 104.

[227] Waterman, "Assessing Children for the Presence of a Disability," p. 6.

[228] U.S. Department of Education, Office for Civil Rights, *Strategic Plan* (July 22, 1994), draft, p. 2.

prehensive, providing detailed guidance on the legal approaches to determining violations of Title VI, section 504, and the ADA. It also provides a history and background of issues relating to the placement of minority students in special education.[229] OCR has also produced investigative guidance, which is still in draft form and which discusses fairness in testing and evaluation practices ("Fairness in Testing" draft guidance). Like the "Minority Students and Special Education" policy, it is extensive and provides detailed guidance on legal approaches. However, the "Fairness in Testing" draft guidance focuses on identifying practices under Title VI and Title IX. It does not clarify whether the legal approaches and analyses on issues such as test validity apply under section 504.[230]

The "Fairness in Testing" draft guidance does, however, reflect OCR's recognition of the interrelationship between the legal and professional standards in educational testing. The guidance is consistent with professional standards on testing.[231] OCR issued the guidance in draft form on March 14, 1995,[232] and it has yet to finalize the policy manual.[233] In developing the investigative guidance, OCR consulted with the National Academy of Sciences, Board on Testing and Assessment, to ensure consistency with professional testing standards.

OCR has conducted compliance reviews targeting the issue of overrepresentation of minority students in special education.[234] To identify school districts for review, OCR's regional offices usually draft a preliminary data letter to school districts. The letter includes requests for policies, procedures, preintervention strategies, evaluation data, enrollments, placements, sample files, population, and composition of teaching staff by race.[235] OCR also has looked at student achievement scores when it has focused on the placement of minority students in special education.[236] Once OCR staff accumulates the data, it conducts analyses to determine if there is a disproportionate representation of minority students in special education programs. If OCR investigators find a significant statistical disparity, they narrow the investigation to identify where the problems actually are occurring. OCR investigators will focus on

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[229] Norma Cantú, Assistant Secretary for Civil Rights, OCR, DOEd, memorandum to All Staff, "Minority Students and Special Education," July 6, 1995, Policy Codification Document No. 00291, pp. 1–46 (hereafter cited as OCR, "Minority Students and Special Education" Policy).

[230] *See* DOEd, OCR, *Fairness in Testing: An Overview* (Mar. 14, 1995), draft document (hereafter cited as OCR, *Fairness in Testing* (draft "Overview") or OCR, *Fairness in Testing* (draft investigative guidance). Section 504 requires that, in the evaluation and placement of students who need or are believed to need special education or related services, tests and other evaluation materials be validated for the specific purpose for which they are used. 34 C.F.R. § 104.35(b)(1) (1996). It should be noted that OCR contends that the *Fairness in Testing* draft document has no applicability to section 504 issues.

[231] *See* ibid., pp. 7–12 (Investigative Guidance).

[232] Ibid.

[233] Susan Bowers, Senior Enforcement Director, OCR, DOEd, interview in Washington, DC, May 28, 1996, p. 2 (former issue contact person on testing issues) (hereafter cited as Bowers interview), p. 2. Part of the testing policy has been disseminated as working policy to OCR staff to provide legal guidance for approaching testing issues. William Lee Wiltbank, Team Leader, Compliance Division II, OCR, Region IV, DOEd, interview in Atlanta, GA, June 4, 1996, p. 3 (hereafter cited as Wiltbank interview).

[234] To date, OCR has not, however, addressed the overrepresentation of minority males in special education. Such a policy should discuss the intersection between Title IX and section 504 in a manner similar to the discussion on Title VI and section 504 in current policy addressing the overrepresentation of minorities and students with limited English proficiency in special education.

[235] Judy Stover, Equal Opportunity Specialist, and Catherine Edwards, Staff Attorney, OCR, Region III, DOEd, telephone interview, June 18, 1996, p. 4 (hereafter cited as Stover and Edwards interview); Linda Colón, Team Leader, OCR, Region II, DOEd, telephone interview, June 12, 1996, pp. 2, 8 (hereafter cited as Colón interview).

[236] Stover and Edwards interview, p. 4.

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the referral process, the evaluation or placement process, or prereferral and preintervention strategies. OCR also determines whether the school district being studied is aware of problems with overrepresentation and identifies what strategies it has implemented or intends to implement to resolve the problem.[237]

OCR investigators have looked not only at the issue of overrepresentation of minority students in special education programs generally, but at overrepresentations based on classifications of disabilities and disparities within disability classifications.[238] For example, on finding that a disproportionately large number of white students are identified as learning disabled and a disproportionately large number of black students are identified as mentally retarded, OCR has conducted further investigation to determine why such a distinction exists and what is the cause.[239] In some cases, OCR has found that within a disability classification, such as learning disabilities or mental retardation, some students are receiving regular education programs with the use of resource rooms, while other students are in self-contained classes. If OCR has identified a disparity based on race and/or national origin in those placements, OCR has sought to determine the causes or explanations for the disparity.[240]

OCR considers adherence to section 504 an integral part of its investigations under Title VI when considering overrepresentation of minority students in special education programs, because school districts often point to compliance with section 504 as the justification for their actions.[241] Therefore, OCR investigators may be conducting simultaneous Title VI and section 504 investigations. With the section 504 aspect, OCR takes a procedural approach and considers whether all the requirements relating to evaluation and placement have been met. If OCR determines that a school district's procedures for evaluation and placement decisionmaking do not comply with the section 504 regulations, OCR will find the school district in violation of section 504. Depending on the circumstances of the case, it may be an individual violation in the school district's evaluation and placement of a student, or it may be a systemic violation of section 504 if the school district's general policies or procedures do not comply with the section 504 regulations. However, the section 504 violation will not necessarily lead to a finding of a Title VI violation unless OCR can first determine that the policies, procedures, or evaluation and placement practice that violated section 504 had a disparate impact on a particular racial or national origin group.[242]

As remedies for students who have been misidentified or mislabeled and inappropriately placed in a special education program, one of OCR's strategies in a resolution agreement is to establish an enrichment and transition program to assist the student in reaching his or her appropriate grade level. OCR would strive to obtain the additional "boost of resources and staff" necessary to compensate the student for the lost educational opportunities due to the mislabeling or misplacement.[243] According to an OCR staff attorney in the Seattle office, in one case involving a functionally mentally retarded third grade student with cerebral palsy, the school district identified him as moderately mentally retarded because they did not know how to evaluate him and his physical disabilities interfered with their evaluation. When the district realized what they had done, they paid close to $3,000 for a comprehensive multidisciplinary evaluation so they could get a correct evaluation of the student. They started a fast-paced transition program, and they provided counseling for his parents and for the student, a computer, outside tutoring, and programs during the summer, so that they could make up for the evaluation problems to the extent that they could.[244] OCR staff members acknowledge, however, that often it is difficult to obtain a complete remedy for the student, one that fully makes up for lost time and instruction in a regular program and that brings the student to the level he or she would have reached absent the misidentification and inappropriate placement.[245]

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[237] Colón interview, p. 3.

[238] Lee Nell, Chief Regional Attorney, OCR, Region III, DOEd, telephone interview, June 11, 1996, p. 21 (hereafter cited as Nell interview); Steve Pereira, Chief Civil Rights Attorney, OCR, Region II, DOEd, telephone interview, June 17, 1996, p. 6 (hereafter cited as Pereira interview).

[239] Nell interview, p. 21.

[240] *See* Pereira interview, p. 6. *See also* Mai Cavalli, Regional Issue Coordinator on Minorities in Special Education, OCR, Region IV, DOEd, interview in Atlanta, GA, June 4, 1996, p. 3 (hereafter cited as Cavalli interview).

[241] OCR, "Minority Students and Special Education" Policy, p. 12.

[242] *See* Jonathan Rosenberg, Staff Attorney, OCR, Region II, DOEd, telephone interview, June 19, 1996, p. 2 (hereafter cited as Rosenberg interview). *See also* Barbara Shannon, Chief Regional Attorney, OCR, Region IV, DOEd, telephone interview, June 3, 1996, p. 5 (hereafter cited as Shannon interview) ("A violation of 504 does not automatically indicate an overrepresentation of minorities in special education.").

Many of the remedies or resolutions focus on preventing further problems with overidentification or misidentification. An OCR staff attorney in the Seattle office notes that if OCR feels that a school district has made "that kind of horrible mistake" with one student, it does not necessarily resolve the case only by resolving that student's problem. OCR has the school district review their policies and procedures and has the school district report to OCR on the findings. It also may require the school district to reevaluate other students to ensure accurate evaluations. Even where OCR finds an individual violation and fashions an individual remedy, when appropriate, it also makes the district remedy the problem for other affected students.[246] OCR also offers as suggestions for school districts methods, or "Promising Practices," to institute at the prereferral, evaluation, and placement decisionmaking stages. Often, OCR emphasizes prereferral interventions because, by intervening for students in the regular classrooms, the schools can assist the students without sending them out to special education classrooms.[247]

In 1997, a compliance review of New York City Public Schools resulted in an agreement or memorandum of understanding between OCR and the school district where the school district agreed to:

- collect and analyze referral and placement information "to prevent inappropriate, disproportionate referral and restrictive placement of minority and limited-English proficient students";
- replicate or expand successful intervention models for students at risk of academic delays;
- measure the academic outcomes of students in special education;
- train parents about special education rights and procedures;
- include information on special education programs in schools' annual report cards.[248]

Whereas black and Hispanic students, respectively, each made up approximately 35 percent of all students in New York City Public Schools, among students in special education, 36 percent were black and 43 percent were Hispanic. Eighty-three percent of students identified with "serious emotional disturbance" were black. Furthermore, black children were almost twice as likely as white children to be placed in "restrictive" special education classes. The overrepresentation of mi-

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[243] Rosenberg interview, p. 3.

[244] Carolyn Madsen, Staff Attorney, OCR, Region X, DOEd, telephone interview, June 10, 1996, pp. 24–25 (hereafter cited as Madsen interview).

[245] Bob Doesickle, Technical Assistance Specialist, Section 504, and Equal Opportunity Specialist, OCR, Region IV, DOEd, interview in Atlanta, GA, June 4, 1996, p. 10 (hereafter cited as Doesickle interview); Hamah King, Team Leader, and Tim Blanchard, Staff Attorney and Team Leader, OCR, Region VI, DOEd, telephone interview, June 26, 1996, p. 3 (hereafter cited as King and Blanchard interview).

[246] Madsen interview, p. 25.

[247] *See* King and Blanchard interview, p. 3.

[248] William J. Cahir, "ED, NY Reach Agreement on Special Education, Race," *Education Daily*, vol. 30, no. 106 (June 3, 1997).

norities in special education in New York City has been attributed to the school district's expensive but ineffective evaluation system.[249] The OCR compliance review followed press accounts that described New York City's special education system as one that "insures a second-class education, particularly for black boys, becoming a trap that incubates failure" and one that "harmed, not helped" black and Hispanic students.[250] OCR's investigation of New York City Public Schools is not its only compliance review examining overrepresentation of minorities in special education. OCR also has conducted compliance reviews in several Virginia school districts. A Virginia newspaper has found that black students are overrepresented in half of the State's special education categories, three times more likely than white students to be identified as "educable mentally retarded," and more likely to be placed in special education in predominantly white school districts.[251]

Referral for Special Education Evaluation

OCR has provided detailed investigative guidance on potential problems in a school's process for referring students for special education evaluation. This guidance is directed at situations when the process may be the cause of overrepresentation of minority students in special education programs. Consequently, the guidance addresses the legal approaches under Title VI *and* section 504. In that guidance OCR notes that the primary concerns are (1) different application of criteria for referral and (2) failure of the recipient school system to follow a consistent and coherent referral system.[252] To investigate the potential problem, OCR often requires a review of data at the classroom or school screening team level. The data can include explanations of referral records, teacher notes, grades, and student disciplinary records. There is no set standard on the quantity or type of data to be reviewed because it varies from case to case depending on the given circumstances. The investigators should determine whether the preliminary data permit the investigation to be narrowed. For example, the data may enable the investigator to identify particular schools or particular referring teachers that appear to be the primary source of disproportionate referral rates.[253]

If a case involves the overrepresentation of minority students in special education or in one particular disability category, OCR applies a Title VI analysis because educational placements that differentiate on the basis of race, color, or national origin trigger Title VI.[254] If OCR identifies that a school district is referring minority students for a special education evaluation or an evaluation for a specific disability category at a disproportionate rate, OCR looks to the school district to justify the criteria or method leading to the disproportionate referral rate. If the OCR investigator cannot pinpoint the specific part of the referral process leading to the disproportion, OCR may look to the school district to justify the entire referral process. If a school district can demonstrate that it has adhered to section 504 and IDEA referral requirements, OCR will consider the school district to have provided adequate justification. However, in instances where there are two effective methods of referral under section 504, the one used by the school district and another that is known to result in less disproportionate rates of referral, reliance on section 504 would not justify failure to use the method with less impact on certain racial or national origin groups.[255] OCR also may find a Title VI violation and a section 504 violation if the school district's implementation of its method of referral is not coherent or consistent.[256]

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[249] Ibid. *See also* Joetta L. Sack, "N.Y.C. To Seek to Cut Minorities in Spec. Ed," *Education Week* (June 11, 1997), p. 3.

[250] Lynda Richardson, "Minority Students Languish in Special Education," *New York Times*, Apr. 6, 1994, sec. A, p. 1.

[251] Vanee Vines, "Critics Say Special Ed is Used to Write Off Minorities: Figures Indicate that Blacks are Over-represented in Virginia's Special Ed Classes," *The Virginian-Pilot*, Sept. 18, 1995, p. A1.

[252] OCR, "Minority Students and Special Education" Policy, p. 8.

[253] Ibid.

[254] For example, using the disparate treatment approach, OCR would have concerns about a violation of Title VI if the school district tries various prereferral strategies for nonminority students but does not attempt such strategies for minority students, if the school district refers minority students based on criteria that are not applied to nonminority students, or if the school district refers minority students based on race or limited English proficiency. Ibid.

In determining whether teacher referrals or subjective criteria are biased toward a student's cultural or ethnic background, OCR reviews the school's referral data to identify any correlations between the number of students referred for special education evaluations, the teacher making the referrals, and the reasons for referral. OCR also looks for differences in test scores among students who are referred and those who are not referred. In addition, OCR may interview the referring teacher.[257]

For violations relating to the referral process, OCR remedies may include the adoption of new or more precise instructions to staff, staff training, reconsideration of the referral of students, and notices to parents, with reporting and monitoring by OCR. It also may include changes in policies, practices, procedures, comprehensive notices, with reporting to and monitoring by OCR. The recipient also may be required to reconsider some of its referrals.[258]

In general, OCR supports informal prereferral or prescreening practices and does not consider these practices as formal evaluations.[259] At the remedy stages of cases, OCR often suggests that these types of regular education interventions help to reduce the number of mistakes in special education placements.[260] However, because schools sometimes use the informal methods to avoid having to meet section 504 due process requirements, OCR will treat an informal evaluation process as a formal evaluation when it begins to resemble a formal evaluation, regardless of how the school labels it.[261] Further, because there is no time limit to prereferral interventions, OCR seeks to ensure that the informal practices are not used to prolong or delay the evaluation process.[262]

According to OCR staff in the Dallas office, that office had an issue involving students with dyslexia in school districts that had "building level screening committees." OCR considered what point in time the school district considered a student's inability to read as reaching the level to be considered dyslexia; it also considered at what point the building level screening committees came into play. OCR also looked at the specific purpose of the building level screening committees. The roles varied from school district to school district. In some districts, their role was to assist teachers in developing and implementing prereferral interventions. In others, they were a necessary part of the referral process. It would depend on the role of the building level committee as to whether the section 504 did or did not apply.[263]

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[255] Ibid.

[256] Ibid., p. 11.

[257] Cavalli interview, p. 5.

[258] OCR, "Minority Students and Special Education" Policy, p. 9, 11.

[259] *See* Jean Peelen, Enforcement Director, DC Metro Office, OCR, DOEd, interview in Washington, DC, May 28, 1996, p. 4 (hereafter cited as Peelen interview); Stover and Edwards interview, p. 6 ("[W]e think [informal assessment/prescreening/prereferral] is very good. For example, in the Virginia State regulations, they have to give a child a study team. This team gets together to evaluate a child. We want a child to stay in the regular classroom before being sent off to special education classes. A preevaluation team is just one of the strategies used to make sure that children just aren't referred."); Nell interview, p. 11.

[260] Peelen interview, p. 4. *See also* Nell interview, p. 11.

[261] Peelen interview, p. 4.

[262] Nell interview, p. 12 ("[S]o long as they're making good faith attempts to reach out to the kid and bring the kid along to where he needs to be, and so far as that does not result in significant delays in actual evaluation and placement for special education, we don't see the harm."); Stover and Edwards interview, p. 6.

Evaluations

OCR's approach to analyzing the evaluation process of a recipient elementary or secondary school is based on a goal of ensuring appropriate classifications and appropriate placements of students.[264] The analysis focuses on the requirement to conduct evaluations to ensure that students are not placed or denied placement without a prior evaluation.[265] It also looks at whether the recipient school follows requisite procedures for the selection, use, and administration of tests or other evaluation materials.[266]

OCR's analysis is based on several provisions in the section 504 regulation at section 104.35.[267] These provisions require schools to conduct an evaluation of a student who needs, or is believed to need, special education or related services. A recipient school must conduct an evaluation of a student who needs or is believed to need special education or related services prior to two types of actions: (1) taking action on the initial placement of the student in regular or special education and (2) any subsequent significant change in placement.[268] These requirements help to ensure that students are neither labeled nor placed in a program without first ensuring the student has a disability and requires such placement.

In terms of the actual procedures for evaluations, the section 504 regulations have specific provisions on the selection, use, and administration of tests.[269] Schools also are required to draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, in interpreting data obtained from evaluations and in making placement decisions.[270] Schools must establish procedures to ensure that information obtained from these sources is documented and carefully considered.[271] Placement decisions must be made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.[272] In addition, the school shall ensure that the placement decision conforms with the least restrictive environment requirement.[273]

In conducting investigations or compliance reviews which address the evaluation and placement process of school districts, OCR investigators take these requirements into consideration. For example, in assessing whether evaluation and placement decisions violated section 504, OCR investigators look at the files of students to ensure that all requisite information is documented and to determine how evaluations were conducted and placement decisions made.[274] In determining whether a school district has drawn upon information about the student's social and cultural background, OCR investigators consider whether the school district's staff spoke with the student's parents or took into consideration the student's home environment and socioeconomic factors.[275] To ensure that teachers' recommendations are not based on subjective data that are biased against a student's cultural or ethnic background, OCR investigators look at the school district's policy and practice with respect to teacher recommendations.[276] OCR also encourages school districts to look at and conduct training on cultural differences and on how to avoid confusing such differences with disabilities.[277] In addition, OCR investigators consider whether the school district is looking at the same kind of information for all students, both minority and nonminority.[278]

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[263] George Cole, Special Project Team Member, Vicki Johnson, Staff Attorney, and Rusty Rayfield, Equal Opportunity Specialist, OCR, Region VI, DOEd, telephone interview, June 26, 1996, p. 8 (hereafter cited as Cole, Johnson, and Rayfield interview).

[264] *See* 34 C.F.R. pt. 104, app. A, subpt. D, no. 25 (1996).

[265] *See* 34 C.F.R. § 104.35(a) (1996).

[266] *See id.* § 104.35(b) (1996).

[267] *See id.* § 104.35(a)–(c) (1996).

[268] *See id.* § 104.35(a) (1996); *id.* pt. 104, app. A, subpt. D, no. 25.

[269] *See id.* § 104.35(b) (1996).

[270] *See id.* § 104.35(c)(1) (1996).

[271] *See id.* § 104.35(c)(2) (1996).

[272] *See id.* § 104.35(c)(3) (1996).

[273] *See id.* § 104.35(c)(4) (1996).

In its investigations, OCR considers whether the school district conducts an evaluation in a reasonably timely manner after the referral of a student for a special education evaluation.[279] OCR may use a State statute or law that sets forth requirements for timely completion of evaluations as a measure of reasonable timeliness.[280] If a school district, without appropriate justification, delays too long in evaluating a student after a referral is made, OCR will conclude that the district has violated the section 504 regulations.[281] OCR also considers the school district's justification for delayed evaluations. OCR will not consider the insufficiency of staff available to complete timely evaluations a justification for delays.[282]

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[274] *See* Stover and Edwards interview, p. 5 (In determining whether a variety of sources were used to make a placement decision, "[o]ur analysis focuses on whether anything is missing. For example, if a student has a particular disability, we would expect to see reports or evaluations from experts in that particular field of disability. . . In other cases, we find that no input is placed in the decision. We make sure that knowledge is given from a variety of areas. Another example is that with a child classified as mentally retarded we look not only for a psychological evaluation, but also an adaptive behavior evaluation." To determine the adaptability in a disabled child, "we look at a child profile first."). *See also* Colón interview, p. 3 ("We look at the information that the district is looking at. . . Are they conducting psycho-social evaluations? Depending on the nature of the disability, hearing evaluations? We are looking to see what information they may examine or call for to determine if placement in a program is appropriate.").

[275] *See* Stover and Edwards interview, p. 6 ("most school districts have a social worker that talks with the parents and goes to the home to evaluate the child's environment. The socioeconomic aspect of a child's life is very important as to how that child will achieve. We ask school districts to seek more minority social workers, and psychologists to help with the evaluations.").

[276] Colón interview, p. 3.

[277] Rosenberg interview, p. 2. *See also* Cavalli interview, p. 5; King and Blanchard interview, p. 5.

[278] Colón interview, p. 3.

[279] *See* Kenneth A. Mines, Regional Director, OCR, Region V, DOEd, letter to Charles Clark, Superintendent, Vigo County School Corporation, Terre Haute, IN, re: Complaint No. 15–91–1085, Oct. 11, 1991, 18 IDELR 473 (hereafter cited as OCR Complaint No. 15–91–1085, 18 IDELR 473) ("Although the Section 504 regulation does not set forth time frames in which evaluations and reevaluations are to be completed, implicit in the Section 504 regulation is the requirement that recipients ensure reasonably timely evaluations and reevaluations so that handicapped students are provided prompt access to appropriate public education services.").

[280] *See* OCR Complaint No. 15–91–1085, 18 IDELR 473, 473–474 (OCR used Indiana Rule S–1 as a measure of reasonable timeliness for evaluations. That rule required that a case conference meeting be held within 40 school days from the date that a student is referred for a special education evaluation.).

[281] *See* Jesse L. High, Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Billy Salter, Superintendent, Mobile County School District, Mobile, AL, re: Complaint No. 04–90–1107, May 25, 1990, 16 EHLR 1328, 1339 (Parent referred student for an evaluation to ascertain if the student had a specific learning disability; district failed to conduct an evaluation for 11 months. OCR concluded that the district did not conduct the evaluation in a timely manner after referral.).

Testing Generally

There are four standards in the section 504 regulation on the selection, use, and administration of tests and other evaluation materials: (1) tests and other evaluation materials must be validated for the specific purpose for which they are used;[283] (2) they must be administered by trained personnel in a manner that conforms to the instructions provided by the producer of the test or materials;[284] (3) they include those tailored to assess the specific areas of the student's educational need and not merely be those designed to provide a single general intelligence quotient, such as an I.Q. test;[285] and (4) they must be selected and administered so as best to ensure that, when it is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure; the test results should not reflect the student's impaired skills unless those skills are the factors that the test purports to measure.[286] These standards were created to ensure that students are not misclassified, unnecessarily labeled as having a disability, or incorrectly placed because of inappropriate selection, administration, or interpretation of evaluation materials.[287] They are intended to prevent misinterpretation and similar misuse of test scores, avoid undue reliance on general intelligence tests, and avoid distortion of test results by the student's disability.[288] Other than their presentation in the section 504 regulation, however, OCR has provided little guidance on the criteria necessary to meet each of these standards under section 504.

OCR has developed a number of strategies to identify testing problems and to encourage schools and State education agencies to address problems in testing. For example, on occasion OCR will consult with educational experts to determine whether a test in question has raised issues in the testing community, and if so, OCR will then try to determine the civil rights implications, if any, involved in those testing issues.[289] In terms of correcting problems in testing, OCR has developed active relationships with some State education agencies that have helped in the correction of testing problems.[290] To deal with issues such as testing bias, OCR has suggested that schools expand the criteria that they use for identifying the presence of disabilities. For example, OCR has suggested the use of certain checklists that include family input or information about child peer interaction[291] when assessing a child for mental retardation.

In cases where there are allegations that a school administered a test inappropriate for the student, OCR reviews documentation on the test to identify whether the school district selected a

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282 OCR Complaint No. 15–91–1085, 18 IDELR 473, 474.

[283] *See* 34 C.F.R. § 104.35(b)(1) (1996).

[284] *See id.* § 104.35(b)(1) (1996).

[285] *See id.* § 104.35(b)(2) (1996).

[286] *See id.* § 104.35(b)(3) (1996).

[287] *See* 34 C.F.R. pt. 104, app. A, subpt. D, no. 25 (1996).

[288] *Id.*

[289] Wiltbank interview, p. 4; Cavalli interview, p. 2 ("More and more we are [using educational researchers or consultants], we have had some people come in and train the staff, we have access to some university staff, and people at the State department of education. We also have a psychologist on staff to help with some of the issues. We use a lot of resource materials as well.").

[290] Ibid., p. 8 (OCR Region IV office has a good relationship with Florida's State education agency, a State with an active compliance unit, and OCR has been successful in persuading the State to correct testing problems relating to disability issues.).

[291] Ibid.

test appropriate for the district's intended use. For example, in one case, a parent alleged that the administration of the WISC–III, an intelligence test, was not appropriate for the parent's child, a 15-year old student, because of his age. OCR found that the WISC–III was developed for use with children between 6 years and 16 years of age. In addition, it found that the test had been shown to be valid in validation studies and norm-referenced by administering the test to a sample of 2,200 students between the ages of 6 and 16. Consequently, OCR found that there was insufficient evidence to show that the district had administered the test inappropriately to the student because of his age.[292]

Test Validity

On the issue of test validity, OCR has produced a draft investigative guidance on fairness in testing. The draft guidance provides detailed guidance on the standards for determining whether a test is valid and whether testing practices are discriminatory under Title VI and Title IX.[293] For example, under a Title VI/Title IX analysis, OCR has different standards for two particular types of test validity—criterion-related validity (predictive validity)[294] and content-related validity[295]—among the various types of test validity (e.g., construct and concurrent). The standard for establishing predictive validity is that the recipient school should establish, through the use of empirical evidence in the form of a report or study, that the test scores correlate to a statistically significant degree with performance on the relevant criterion. The standard for establishing content validity is that a recipient should produce credible evidence, based on accepted professional standards of the degree to which the samples of items, tasks, or questions on a test are representative of the knowledge and skills being measured. In assessing a test's content validity, OCR may also assess whether the school instructs students in the knowledge and skills measured by the test.[296]

Under the Title VI/Title IX analysis, OCR uses current generally accepted professional standards in evaluating the validity and reliability of a test or evaluation procedures on the evidence submitted to prove test validity. In determining whether the evidence provided by the recipient school is adequate to justify the use of the test, OCR will rely on professionally accepted standards and upon the recommendations of experts from within and outside the U.S. Department of Education. OCR will not assume a test's validity based on the general reputation of a test, its author, or its publisher; casual reports of the test's validity; the test's name or descriptive labels, such as "achievement test" or "aptitude test"; promotional literature about the test; or testimonial statements and credentials of test publishers, consultants, or recipients who previously have used the test. However, OCR will consider portions of a publisher's test manual as evidence of the test's validity if the manual cites specific studies showing that the test is valid. OCR also will consider validity studies of the test conducted by the recipient school, other schools, test publishers or distributors, or professional researchers. For such studies to be acceptable evidence, however, the recipient school's use of the test must be the professionally accepted equivalent to the use for which the test was validated and the study must have been conducted within a professionally accepted time frame prior to the date of the test's use. In addition to evidence of a test's validity, OCR requires evidence of a test's reliability over time which conforms to accepted professional standards.[297]

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[292] Rolando Alvarado, Director, Compliance Division, OCR, Region II, DOEd, letter to Donald Merachnik, Superintendent, Union County Regional High School District 1, Springfield, NJ, re: Complaint No. 02–93–1110, May 31, 1995, pp. 3, 4.

[293] *See* OCR, *Fairness in Testing*, pp. 7–12 (draft investigative guidance) and pp. 1–3 (Tab B).

[294] Criterion-related or predictive validity is implicated when a recipient is using test scores to predict students' performance on a particular criterion or performance measure. Ibid., p. 7.

[295] Content-related validity is implicated when a recipient is using a test to measure the acquisition of specific knowledge or academic skills. Ibid., p. 8 (Investigative Guidance).

[296] Ibid., pp. 7–8.

It is unclear whether these Title VI/Title IX standards on test validity are also the standards for test validity under a section 504 analysis.[298] Two policy memoranda, which predate the draft policy manual, have presented standards for test validity under section 504. According to a 1984 OCR policy memorandum on special education test validity and reliability, it is permissible to rely on evidence such as the State's description of the tests in question and the consensus of findings gained by the educational assessors both informally and through standardized means to assess the tests' validity.[299] According to a 1985 OCR policy memorandum on test validity, tests and other evaluation materials are considered valid when (1) there is documentation, supplied by the test developer or other research groups, (2) the tests successfully measure what they claim to measure; (3) they are used only for the specific purpose(s) for which they were developed; and (4) they are administered in conformance with the instructions provided by the publisher. The 1985 policy memorandum further specifies that, in determining whether testing and evaluation materials are valid, OCR investigators should request from the recipient school system information about all the tests used for diagnosis or evaluations, the purposes of those tests, descriptions of the suspected disabilities and class of students (e.g., race, ethnicity), if applicable, for which each test is to be given. OCR investigators also should request from the school district any information on the validity of the tests and evaluation materials provided by the publishers. They then should collect and review, with assistance from headquarters if necessary, a complete list of the tests and evaluation materials, when they are used and for which potential students with disabilities, and any validation studies conducted by publishers of tests that are new or with which the region has had no prior experience. OCR investigators should use the validation studies to compare the stated uses in those studies to the actual uses by the school district. The policy memorandum cautions that OCR should not pass judgment on what the test maker or other experts state regarding what the test measures.[300]

Although the 1985 policy memorandum is fairly specific and comprehensive, it is not the definitive statement on OCR's testing policy under section 504, according to one of OCR's Senior Enforcement Directors who was the former issue contact person on testing.[301] The investigative guidance in the draft investigative guidance on testing is more definitive, and portions of the analysis outlined in the 1985 memorandum appear as part of the standards on testing outlined in the draft investigative guidance. It is unclear to what extent the draft guidance applies to section 504 cases, particularly because it specifies that it does not apply to modifications of tests and/or testing conditions required for the purpose of accommodating students with disabilities under section 504 and the ADA.[302]

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[297] Ibid., p. 9.

[298] Based on language in the draft investigative guidance, the manual presents legal standards and investigative guidance on testing practices for determining violations under Title VI and Title IX only. *See* OCR, *Fairness in Testing*, pp. 4–5 (draft "Overview"); Ibid., pp. 1–14 (draft investigative guidance). Neither the guidance nor OCR policies or other guidance materials specify that the analysis provided in the draft policy guidance is the analysis under section 504.

[299] *See* Harry M. Singleton, Assistant Secretary for Civil Rights, OCR, DOEd, memorandum to Gilbert D. Roman, Regional Civil Rights Director, Region VIII, "Special Education Test Validity and Reliability—Docket No. 08833001," Feb. 29, 1984, Policy Codification System Doc. No. 00053, p. 1. To assess the tests' reliability, OCR compared the results of the tests in question with the child's success in school, descriptions of the child's cognitive and socioemotional functioning, and the results of a known valid and reliable test. From this comparison, OCR identified the percentage chance that the scores received on the tests in question were accurate. Ibid., pp. 1–2.

[300] Harry M. Singleton, Assistant Secretary for Civil Rights, OCR, DOEd, memorandum to John E. Palomino, Acting Regional Civil Rights Director, Region IX, "*San Francisco Unified School District*, OCR Case #09–85–1013—Policy Request," Apr. 4, 1985, Policy Codification System Doc. No. 00057, pp. 2–3 (hereafter cited as OCR, Policy on *San Francisco Unified School District*, OCR Case #09–85–1013).

[301] *See* Bowers interview, pp. 4–5.

OCR has not addressed the question of whether the section 504 requirement that tests be validated for the special purpose for which they are used[303] requires validation of tests for students of a particular race or national origin group. OCR notes that this currently is an open question that it hopes to have answered through assistance from the National Academy of Sciences, Board on Testing and Assessment.[304]

In practice, when OCR conducts compliance reviews or investigations on testing issues, the investigators identify what other tests the school district uses for evaluation and placement decisions. Often, investigators find that schools rely on standardized tests that are referenced in manuals listing validation studies for tests.[305] OCR investigators then consult those manuals which indicate whether the tests have been validated. Once the investigators identify that a test has been validated, they do not question the validation studies for that test.[306] In addition to reviewing the tests, any validation studies for the test in question and the school district's reasons for using the test, OCR investigators also may talk to the students who took the test to determine whether the school district administered it in accordance with the test makers' guidelines.[307]

Intelligence Tests

OCR has provided some guidance specifically on the use of intelligence tests in the diagnostic and screening process and in the placement of students in special education programs. Section 504 prohibits the evaluation and placement of students solely on the basis of tests that are designed to provide a single general intelligence quotient.[308] OCR has specified in a policy memorandum that lack of use of intelligence tests for evaluating and placing students with disabilities in special education programs does not violate section 504.[309]

Discriminatory Testing Practices Under Title VI or Title IX: Use of Section 504 Standards and Simultaneous Section 504 Violations

Through its draft policy manual on fairness in testing, OCR has provided guidance on the theories of discrimination applied in cases that involve discriminatory test use under Title VI and Title IX. However, the guidance manual does not address discriminatory testing practices under section 504, and it does not apply to issues relating to the modifications of tests and/or testing conditions required for the purpose of accommodating students with disabilities under section 504 or the ADA.[310]

OCR uses disparate treatment and disparate impact analyses to determine whether a testing practice or policy is discriminatory under Title VI or Title IX. Under a disparate treatment analysis, OCR determines whether a policy or practice regarding testing is being applied differently by a recipient of Federal funds to an individual student or group of students of a particular race, national origin, or gender, without a legitimate, nondiscriminatory reason.[311] If OCR finds a difthe selection, use, or administration of a test because the recipient school is providing testing accommodations or auxiliary aids to qualified individuals with disabilities as required by section 504 or Title II of the ADA, then a legitimate nondiscriminatory reason for the different treatment exists. In this instance, OCR would find that there is no violation of section 504, Title II of the ADA, Title VI, or Title IX.[312]

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[302] OCR, *Fairness in Testing*, p. 3 (draft "Overview").

[303] 34 C.F.R. § 104.35(b)(1) (1996).

[304] OCR, "Minority Students and Special Education" Policy, p. 7 (Legal Approaches for Investigations); Bowers interview, p. 13.

[305] Joe Mahoney, Equal Opportunity Specialist, and Eva Das, Staff Attorney, OCR, Region III, DOEd, telephone interview, June 18, 1996, p. 5.

[306] *See* Nell interview, p. 18.

[307] Wiltbank interview, p. 9.

[308] 34 C.F.R. § 104.35(b)(2) (1996); OCR, "Minority Students and Special Education" Policy, p. 8.

[309] OCR, Policy on *San Francisco Unified School District*, OCR Case #09–85–1013, p. 2.

[310] OCR, *Fairness in Testing*, p. 3 (draft "Overview").

OCR's disparate impact analysis is a two-part analysis, using standards for proving discrimination under Title VI or Title IX that, in part, borrow from standards under the section 504 regulations. Under the analysis, OCR considers whether the use of an educational test has a disparate impact on members of a particular race, national origin, or gender group. If OCR finds a disparate impact, OCR will determine that the test use violates Title VI or Title IX if using the test is not educationally necessary.[313]

Discriminatory testing practices under Title VI and Title IX include problems associated with the overidentification of students of a particular race, national origin, or gender in special education programs. Title VI/Title IX disparate impact analysis relies on some of the same proof standards used under section 504 to show that overidentification associated with race, color, national origin, or sex in special education programs can trigger simultaneous violations of Title VI/Title IX and section 504.

Under a disparate impact analysis, OCR focuses on the effects of applying a neutral testing policy. OCR identifies instances where the effects are severe and adverse, meaning that there is a significant disproportion of students of a particular race, national origin, or gender being identified as needing special education, because of the use of a test.[314] If OCR finds that the use of a test caused or contributed to a disparate impact on members of a particular race, national origin, or gender, it treats the recipient school's use of the test or testing policy as a possible failure to comply with Title VI or Title IX. After a finding of disparate impact, OCR will determine that use of the test or testing policy is discriminatory under Title VI or Title IX if it is not educationally necessary.

There are two types of testing practices that cannot be considered educationally necessary. First, if OCR finds that a test has a disparate impact, that the test is used as the sole or principal criterion for making an educational decision, and that the test was clearly not designed to be used in this way, OCR concludes that the use of the test is not educationally necessary. Second, if OCR finds that a test has a disparate impact and that it clearly is not being used for the purpose for which it was designed, OCR will determine that the use of the test is not educationally necessary. OCR considers both of these instances "*per se* violations" meaning that OCR need not conduct any further analysis to determine that the test use violates Title VI or Title IX.[315]

If a *per se* violation is not established, OCR must conduct further analysis to determine if the test use is educationally necessary. In this instance, OCR considers two factors: (1) whether the recipient school has produced evidence sufficient to show that the test is valid for the purpose for which it has been selected to be used, and (2) whether a less discriminatory alternative test or other evaluation material exists that would substantially serve the recipient school's stated purpose for using the test.[316]

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311 Ibid., p. 4.

312 *See* OCR, *Fairness in Testing*, p. 14 (draft investigative guidance).

313 Ibid., p. 3.

314 OCR, *Fairness in Testing*, pp. 4–5 (draft "Overview"); Ibid., p. 3–4 (draft investigative guidance). OCR identifies the significant disproportions through a three-step statistical analysis. *See* ibid., pp. 1–5 (Investigative Guidance) (Tab A) (discusses the steps for establishing disparate impact).

315 Ibid., pp. 4–5 (Overview) and ibid., p. 5 (Investigative Guidance).

In OCR's Title VI/Title IX disparate impact analysis, factors on the use of tests as the sole or principal criterion and on the use of tests beyond their intended purpose model the section 504 regulation provisions on evaluations and testing.[317] Consequently, OCR may find that a recipient school violated both Title VI or Title IX *and* section 504, if the use of the test or the testing policy resulted in a disparate impact on members of a particular race, national origin, or gender, *and* if either (1) the test was used as the sole or principal criterion for educational decisions and should not have been used in this way or (2) the test was not used for the purpose for which it was designed. In essence, this means that a testing practice which is a *per se* violation of Title VI or Title IX also is a violation of section 504.[318]

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[316] Ibid., pp. 4–5 (Overview), ibid., p. 3–6 (Investigative Guidance). The recipient school has the burden to prove that a test is valid. OCR has to show that a less discriminatory alternative exists. Ibid. (Investigative Guidance).

[317] *See* 34 C.F.R. § 104.35(b)(1) (1996) ("Tests and other evaluation materials have been validated for the specific purpose for which they are used. . ."); *id.* § 104.35(b)(2) ("Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient"); *id.* § 104.35(c)(1) ("In interpreting evaluation date and in making placement decisions, recipient shall (1) draw upon a variety of sources . . .).

[318] *See* OCR, "Minority Students and Special Education" Policy, p. 7 ("Because Section 504 regulates school districts' treatment of all students with disabilities, it provides a legal theory that can be employed in conjunction with Title VI.").

Chapter 6

Structuring Educational Programs

The response to individual differences need not involve the exclusion of some, the expulsion of others, the separation and segregation of yet others, and the "dumbing down" of the curriculum. We can organize schools so that all succeed.[1]

In educating students, whether disabled or nondisabled, it is important to recognize that each student is unique, with skills, abilities, and talents that may be different from those of other students. Recognizing this uniqueness is critical when structuring educational programs. It is an important aspect at the institutional level, in developing and planning school programs, class offerings, and class structure, and at the individual level, in ensuring that each student receives an education suited to his or her needs and abilities. At the institutional level, one consideration in structuring educational programs is to maintain a primary objective of providing access to regular classes for all students. At the individual, student level, two means of ensuring that educational programs recognize the differences in each student is to develop educational programs to reflect a student's different abilities in various subjects and to reevaluate periodically and modify educational programs to reflect a student's different abilities in various subjects and changes in achievement, performance, and development.

Maintaining a Primary Objective to Place Students in Regular Classes to the Greatest Extent Possible

Development of an Individual Education Program

Once a student has been identified and diagnosed as having a disability, if the disability is covered under the Individuals with Disabilities Education Act (IDEA), the school must take steps to develop an Individualized Education Program (IEP) for the student. The IEP is defined in the IDEA as a written statement for each child with a disability, that includes:

> a statement of the child's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives; a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will provide for the child; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class; a statement of any individual modifications in the administration of State or districtwide assessments of student achievement that are needed in order for the child to participate in such assessment; the projected date for the beginning of the services and modifications; a statement of transitional services needed. . . .[2]

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[1] Alan Gartner and Dorothy Kerzner Lipsky, *Beyond Separate Education: Quality Education for All* (Baltimore: Paul H. Brookes Co., 1989), p. xxvii.

[2] Pub. L. No. 105–17, § 614(d) (1997).

Thus, the IEP must include the following:

- the nature of the child's problem
- the program's long-term goals
- the program's short-term objectives
- the special education services the child will receive
- the criteria for gauging the effectiveness of these services.[3]

An IEP team is responsible for developing and implementing the IEP. The IDEA requires that the IEP team consist of a representative of the school qualified to administer or supervise the special education program, a regular education teacher, parent(s), other individuals at the discretion of the parent or school; and in some circumstances, the participation of the student with the disability is required.[4]

The IEP is one means of ensuring that students with disabilities obtain an appropriate education, facilitated through proper evaluations, the provision of related services, and appropriate placement of the student with a disability in the least restrictive environment. In addition to setting annual educational goals and benchmarks,[5] the IEP fulfills a number of other educational needs. For instance, the IEP provides school administrators, faculty, and parents with a means of monitoring the development of students with disabilities, and their progress in school. Also, the IEP can be helpful in identifying problem areas so that teachers and/or parents can focus their remediation efforts.[6]

Under Federal law and policy, the concept of the IEP plays a major role in seeking to ensure that schools provide all students with disabilities equal educational opportunities. However, section 504 does not require that students have a written IEP. Section 504 regulations state that schools can use the IDEA requirements for an IEP as one means of satisfying the section 504 requirement for meeting the individualized educational needs of students with disabilities.[7]

Placement of Students with Disabilities in Education Programs

After the development of the IEP, schools should place the student in a regular or special education placement that provides the services described in the IEP based on the principle of least restrictive environment. Placement is commonly understood to be the selection of a setting where a child with a disability will receive his or her education. Placement cannot drive development of the Individualized Education Program (IEP). When developing an IEP for a student with a disability the school determines the special education and related services needed by the child. The school then determines the placement that is the least restrictive environment in which the child's IEP can be implemented.[8] In practice, a variety of instructional settings and arrangements have been used to educate students with mental retardation, learning disabilities, behavioral disabilities, or serious emotional disturbances (see table 6.1). For example, students with these disabilities can receive the majority of their

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[3] Samuel A. Kirk, James J. Gallagher, and Nicholas J. Anastasiow, *Educating Exceptional Children*, 8th ed. (New York: Houghton Mifflin, 1997), p. 62 (hereafter cited as Kirk et al., *Educating Exceptional Children*).

[4] Pub. L. No. 105–17, § 614(B) (1997).

[5] U.S. Congress, Senate, Committee on Labor and Human Resources, *Individuals with Disabilities Act Amendments of 1997*, 105th Cong., 1st sess., May 9, 1997, p. 20.

[6] H. Rutherford Turnbull III, *Free Appropriate Public Education: The Law and Children With Disabilities* (Denver: Love Publishing Co. 1994), pp. 123–24.

[7] 34 C.F.R. § 104.33(b)(1)(i)(1996).

[8] The IDEA requires that school districts develop an IEP for each child with a disability needing special education and related services because of the disability. 34 C.F.R. § 300.341(a) (1996). See pp. 163–66 for a discussion of the IEP and the section 504 for providing an appropriate education that meets the individualized educational needs of students with disabilities. The implementation of an IEP in accordance with the IDEA is one means of meeting the section 504 requirements.

TABLE 6.1
Educational Environments of Students with Disabilities, 1992-1993 School Year
(Percentage of students)

	Regular class	Resource room	Separate class	Separate school	Residential facility	Homebound/ hospital
Specific learning disability	39.3	41.0	18.8	0.6	0.1	0.1
Speech or language impairment	87.5	7.6	4.5	0.3	0.0	0.1
Mental retardation	8.6	26.1	57.0	7.0	0.7	0.5
Serious emotional disturbance	20.5	25.8	35.3	13.4	3.2	1.8
Multiple disabilities	9.1	19.8	44.1	21.8	3.2	2.0
Hearing impairment	30.6	20.0	30.6	7.0	11.6	0.2
Orthopedic impairment	37.4	20.7	33.3	5.3	0.5	2.9
Other health impairment	40.0	27.0	21.3	1.8	0.4	9.4
Visual impairment	45.2	21.3	18.3	4.1	10.6	0.5
Autism	9.6	8.1	54.5	23.4	3.9	0.5
Deaf-blindness	7.7	8.0	34.6	24.3	23.2	2.2
Traumatic brain injury	22.3	23.5	30.2	18.3	2.6	3.0
All disabilities	43.4	29.5	22.7	3.1	0.7	0.6

Source: U.S. Department of Education, *Eighteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, DC: U.S. Department of Education, 1996), table 3.5, p. 71 (citing U.S. Department of Education, Office of Special Education Programs, Data Analysis System (DANS)).

educational program in regular classrooms and receive special education and related services either within regular classes or elsewhere for a small portion of the day.[9] They can receive instruction in special classrooms, often known as resource rooms,[10] with part-time instruction in a regular class.[11] Schools may place them in separate, self-contained classes with part-time instruction in regular classes, or they may place the students in separate classes full time within a regular school.[12] Students with disabilities may receive special education and related services in a separate school for all or most of the school day.[13] They also may receive education in public or private residential facilities at a public school district's expense, or public school districts may provide tutors to the students in a hospital or at the student's home.[14]

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[9] The U.S. Department of Education (DOEd) defines placement in a regular class to include students who receive the majority of their education program in a regular classroom and receive special education and related services outside the regular classroom for less than 21 percent of the school day. This definition includes children placed in a regular class and receiving special education within the regular class, as well as children placed in a regular class and receiving special education outside the regular class. U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities, Seventeenth Annual Report to Congress on the Implementation of The Individuals with Disabilities Education Act* (Washington, DC, 1995), p. 13 (hereafter cited as DOEd, *1995 IDEA Report*).

[10] Resource rooms are special classrooms for teaching students with mild handicaps for part of the school day. James L. Nickles, Terry G. Cronis, Joseph E. Justen, III, and Garnett J. Smith, "Individualized Education Programs: A Comparison of Students with BD, LD, and MMR. Do IEP Objectives Differ Across Handicapping Conditions?" *Intervention in School and Clinic*, vol. 28, no. 1 (September 1992), pp. 41–44.

[11] DOEd defines placement in a resource room as including students who receive special education and related services outside the regular classroom for at least 21 percent but not more than 60 percent of the school day. This includes placement in resource rooms with part-time instruction in a regular class. DOEd, *1995 IDEA Report*, p. 13.

Federal Law and Policy

The IDEA, its regulations, and the regulations implementing section 504 set forth a strong preference for placement of students with disabilities in the regular educational environment,[15] meaning placement in regular schools and, if appropriate, regular classrooms. They require that each student with a disability be educated with nondisabled students to the maximum extent appropriate to the needs of the student who has a disability.[16] In addition, they require that each student with a disability be educated as close as possible to his or her home, even if the student cannot be educated in a regular school.[17] Provisions in the IDEA, IDEA regulations, and the section 504 regulations recognize that placement in other settings may be necessary to educate students with disabilities.[18] Schools can place students with disabilities outside of regular classes and/or regular schools if the students cannot achieve satisfactorily even when provided with supplementary aids and services to assist them in the regular educational setting.[19] Therefore, the provision of educational services to students with disabilities can occur in any of a number of settings, such as a regular classroom, a self-contained classroom, a separate school, the student's home, or a private or public institution, depending on the least restrictive environment in which the needs of the individual student can be met.[20]

Because schools must develop educational programs and place students with disabilities according to their individual needs, schools must be prepared to offer one or more of several educational settings, across a continuum of alternative placements.[21] To prevent students with disabilities from being "dumped" into regular classes, the law requires schools to provide supplementary aids and services that are necessary to meet the students' needs during placement in regular education programs.[22] These services can include a teacher's aide or paraprofessional to assist the students in the learning process, school health services to accommodate the students' needs, or counseling services. Schools should base educational programming and placement around the needs of each student; hence, the educational experience for each disabled student should be unique. In addition, schools should maintain a primary objective of placing students with disabilities in the regular education program to the maximum extent possible. Once a student with a disability is placed in a regular education setting, the student should not be removed from that setting, unless the school has considered the full range of supplementary aids and services available.

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[12] DOEd defines placement in a separate class as including students who receive special education and related services outside the regular classroom for more than 60 percent of the school day. Students may be placed in self-contained classrooms with part-time instruction in regular classes or placed in self-contained classes full-time on a regular school campus. Ibid., p. 14.

[13] DOEd defines placement in a separate school as including students who receive special education and related services in a separate day school for students with disabilities for more than 50 percent of the school day. Ibid.

[14] DOEd defines placement in a residential facility as including students who receive education in a public or private residential facility, at public expense, for more than 50 percent of the school day. It defines homebound/hospital environment as including students placed in and receiving special education in hospital or homebound programs. Ibid.

[15] *See* Pub. L. No. 105–17, § 612(a)(5) (1997); 34 C.F.R. § 300.550(b)(2) (1996); 34 C.F.R. § 104.34(a) (1996) (stating that "[a] recipient shall place a [student] with a disability in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.").

[16] *See* Pub. L. No. 105–17, § 612(a)(5)(A) (1997); 34 C.F.R. § 300.550(b)(1) (1996); 34 C.F.R. § 104.34(a) (1996).

[17] *See* 34 C.F.R. § 300.552(a)(3) (1996); 34 C.F.R. § 104.34(a) (1996).

[18] *See* Pub. L. No. 105–17, § 602(25) (1997); 34 C.F.R. § 300.550(b)(2) (1996); 34 C.F.R. § 104.34(a) (1996).

[19] *See* Pub. L. No. 105–17, § 6129(a)(5)(A) (1997); 34 C.F.R. § 300.550(b)(2) (1996); 34 C.F.R. § 104.34(a) (1996).

[20] *See* 34 C.F.R. §§ 300.17(a)(1)(i) & 300.551(b)(1) (1996); 34 C.F.R. pt. 104, app. A, subpt. D, no. 23 (1996) ("An appropriate education could consist of education in regular classes, education in regular classrooms with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or at private or public institutions. . .").

[21] *See* 34 C.F.R. § 300.551(a) (1996); 34 C.F.R. § 104.33(b) & app. A, subpt. D, no. 23 (1996).

The Federal provisions favoring placement in the regular educational environment often are referred to as the "least restrictive environment" (LRE) requirement.[23] The IDEA and section 504 provisions do not actually use the term "least restrictive environment." However, taken together, they establish LRE as an important value in educational placements for students with disabilities. Moreover, there is no substantial difference in analysis of LRE under the IDEA and section 504. The basis of the LRE requirement is that students with disabilities should have maximum opportunities to interact with nondisabled students. Opportunities for interaction with nondisabled students should extend beyond the regular classroom to nonacademic and extracurricular services and activities, including meals, recess periods, athletics, counseling, and other clubs or groups.[24]

The least restrictive environment requirement has been one of the most heavily litigated issues since the creation of the IDEA, section 504, and their implementing regulations in the 1970s. Many parents of students with disabilities have challenged the decisions of school districts to place the students outside regular classrooms or regular schools. Although there has been no U.S. Supreme Court decision interpreting the least restrictive environment requirement under the IDEA or section 504, the Federal circuit courts have dealt with the LRE requirement.

Federal circuit court cases that have construed this requirement have done so under the IDEA. These cases have offered analyses for determining whether to remove students with disabilities from regular classrooms. For example, in *Oberti v. Board of Education of the Borough of Clementon*,[25] the Third Circuit court held that the school district has the burden of proving compliance with the LRE requirement of the IDEA, regardless of which party brought the claim in court. In evaluating whether placement in the regular classroom with supplementary aids and services can be achieved satisfactorily, the court stated that the following factors should be evaluated: (1) whether the school district has taken adequate steps to include the child in the regular classroom, including whether it has considered the whole range of supplemental aids and services appropriate to the child's disability and modification of the regular curriculum to accommodate the child; (2) a comparison between the educational benefits the child will receive in a regular classroom with supplementary aids and services and the benefits the child will receive in a segregated, special education classroom, taking into account that a determination that a child may make better academic progress in a segregated, special education setting may not warrant exclusion of the child from the regular classroom; and (3) whether, taking into account appropriate supplementary aids and services, inclusion of the child would negatively affect the other children in the regular classroom. The court also noted that other factors may be relevant depending on the circumstances of a specific case. The court also stated that in cases in which a child cannot be placed in the regular classroom for the major part of his educational program, the school is required to include the child in school programs with nondisabled children whenever possible.

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[22] *See* 34 C.F.R. § 300.551(b)(2) (1996); 34 C.F.R. §§ 104.33(b) & 104.34 (1996). *See also* Oberti v. Board of Educ. of Borough of Clemonton Sch. Dist., 789 F.Supp. 1322, 1337 (E.D. N.J. 1992) (denying motions for summary judgment) (noting that section 504 requires inclusion within a regular class in the student's local school if feasible and citing Strathie v. Department of Transportation, 716 F.2d 227, 231 (3d Cir. 1983), Alexander v. Choate, 469 U.S. 287, 300 n. 19 (1985), for the proposition that "provider must make 'reasonable modifications in its programs' to accommodate individuals with disabilities," as well as 34 C.F.R. § 104.34 and 34 C.F.R. § 104.4(b)(2)).

[23] *See* DOEd, Office for Civil Rights (OCR), "Section 546—Least Restrictive Environment (LRE) Requirement," *Section 504 and Americans with Disabilities Act (ADA) Title II Manual* (Mar. 21, 1996), *reprinted in* OCR's electronic library at HQ963546.RGC (hereafter cited as OCR, "Section 546—Least Restrictive Environment (LRE) Requirement"). *See also* Mark C. Weber, *Special Education Law and Litigation Treatise* (Horsham, PA: LRP Publications, 1992), pp. 9:1–9:19.

[24] *See* Madeleine Will, Assistant Secretary for Special Education and Rehabilitative Services, DOEd, response to inquiry by Ray L. Earnest, Franch, Earnest & Cowdrey, P.A., Sept. 24, 1986, 211 EHLR 418.

[25] 995 F.2d 1204 (3d Cir. 1993).

In *Daniel R.R. v. State Board of Education*,[26] the Fifth Circuit court offered similar reasoning. It stated that the standard for determining compliance is whether (1) education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily for a given child, and (2) where it cannot, whether the school has mainstreamed the child to the maximum extent appropriate. Factors looked at by the court to determine if the school district met the first prong of the test were (1) whether the school district had made appropriate efforts to provide appropriate supplementary aids and services and to modify the curriculum; (2) a balancing of the educational benefits that the child will receive from regular education, as compared to special education, taking into account that academic achievement is not the sole purpose of the mainstreaming requirement and that integration into a nonsegregated environment may be beneficial in and of itself; (3) a determination of the effect of inclusion of the child with a disability in the regular classroom on the education of the other students, taking into account the need to provide supplementary aids and services, but recognizing that in some cases involving disruptive behavior or the need for an inordinate amount of teacher's time, the rest of the class may suffer. In cases where the child cannot be placed in the regular classroom, the court indicated that a determination as to whether the school district had mainstreamed the child to the maximum extent possible would turn on whether the school district had considered, and, as appropriate, taken, intermediate steps, such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only, or providing interaction with nonhandicapped children during lunch and recess.[27]

At least one Federal district court has addressed the least restrictive environment requirement under section 504. In *Oberti v. Board of Education of the Borough of Clementon School District*,[28] the district court noted that section 504 required placement of a student with a developmental disability, including mental retardation, and a communication, impairment, in a regular classroom in his local school if feasible.[29]

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[26] 874 F.2d 1036 (5th Cir. 1989).

[27] *Id.* at 1048–50.

[28] 789 F. Supp. 1322 (E.D. N.J. 1992). *Oberti* involved the educational placement of Rafael Oberti, a student born with Down Syndrome resulting in a developmental disability including mental retardation and a communication impairment (difficulty with expressive language). At the end of Rafael's kindergarten year, the school district's Child Study Team proposed an out-of-district placement which Rafael's parents rejected. The parents instituted state administrative proceedings to challenge the placement, and as a result of mediation, there was an agreement to place Rafael in an out-of-district class for the "multiply handicapped." Rafael's parents later requested an administrative hearing because of dissatisfaction with the placement, and the administrative law judge affirmed the out-of-district placement. From this decision, Rafael's parents filed suit under the IDEA and section 504. *Id.* at 1324–25.

Educational Research and Policy Perspectives

Educational researchers and scholars have noted the importance attached to regular education placements for students with disabilities.[30] They offer a number of reasons for favoring regular education placement. First, placement in regular classes implements the concept of equal access and can teach students the fundamental principles of living in a democratic society.[31] By placing students with disabilities in regular classes to the greatest extent possible, schools improve access for students with disabilities to the classes and opportunities available to nondisabled students. Second, the objective of regular education placement supports preparation of students for adult life.[32] Third, by maintaining a primary objective of placing students with disabilities in regular classes to the greatest extent possible, schools foster other benefits associated with regular education placements. For example, for students with disabilities, there can be benefits in learning, development, self-esteem, and social skills. In addition, regular education placement may prevent labeling of students as "special education students," thereby reducing negative effects of labeling on students' motivation and self-esteem.[33] Fourth, there is some support in research literature indicating that placement in regular classes improves the academic achievement of students with disabilities. Regular education placement often results in positive learning and social outcomes for students with disabilities.[34]

According to some educational researchers and scholars, other individuals also benefit from the placement of students with disabilities in regular classes. The participation by students with and without disabilities in regular classes supports an environment accepting of all.[35] Teachers and students can see the unique qualities of each individual with different educational needs, and the students have an opportunity to acquire more accepting attitudes and understanding about people with disabilities in general.[36] Parents of students with disabilities can gain more support and encouragement to become involved in their children's education. In addition, regular and special education teachers can enhance their flexibility in teaching, and by teaching students with diverse needs, they can increase their professional confidence.[37]

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[29] *Id.* at 1337. The court in this case, however, did not rule on whether placement in the regular classroom was most appropriate for the student, as this issue remained in question and was reserved for decision at a later trial. The case involved cross motions for summary judgment which the court denied because genuine issues of fact remained on what was the most appropriate placement for the student.

[30] *See e.g.*, Bruce R. Taylor, Ed.D., "Inclusion: Time for a Change—A Response to Margaret N. Carr," *Journal of Learning Disabilities*, vol. 27, no. 9 (November 1994), pp. 579–80 (stating that "regular education is not only where the responsibility lies, but also where those with learning disabilities *deserve* to be educated."); Miriam A. Phelps, *Inclusion and Integration and School Climate* (1993), p. 7, *reproduced by* the Educational Resources Information Center (ERIC), EC 303 207, p. 8; Susan Stainback and William Stainback, "A Rationale for Integration and Restructuring: A Synopsis," in John Wills Lloyd, Nirbhay N. Singh, and Alan C. Repp, eds., *The Regular Education Initiative: Alternative Perspectives on Concepts, Issues, and Models* (Sycamore, IL: Sycamore Publishing Co., 1991), p. 225; National Joint Committee on Learning Disabilities, "Providing Appropriate Education for Students with Learning Disabilities in Regular Education Classrooms," *Journal of Learning Disabilities*, vol. 26, no. 5 (May 1993), p. 330; Ray Van Dyke, Martha Ann Stallings, and Kenna Colley, "How to Build an Inclusive School Community: A Success Story," *Phi Delta Kappan* (February 1995), p. 476 (hereafter cited as Van Dyke et al., "How to Build an Inclusive School").

[31] *See* Phelps, *Inclusion and Integration*, p. 8 ("The best way to teach democracy is to give people equal opportunity to develop to their fullest potential. In education, this means black, white, male and female, and disabled and non-disabled students going to school together.").

[32] *See* ibid.; Van Dyke et al., "How to Build an Inclusive School," p. 476.

[33] *See* National Joint Committee on Learning Disabilities, "Providing Appropriate Education," p. 330.

[34] *See* Van Dyke et al., "How to Build an Inclusive School," pp. 476, 478; Karen Sindelar, "How and Why the Law Has Failed: An Historical Analysis of Services for the Retarded in North Carolina and a Prescription for Change," *Journal of Law & Contemporary Problems* (vol. 48) p. 130 (Spring 1985)(citing "Age-Appropriate High School Programs for the Moderately Retarded, in Pro-Action: A Newsletter from the N.C. Governor's Advocacy Council for Persons with Disabilities," Special Issue (June 1982)); Alan Gartner and Dorothy Kerzner Lipsky, "Beyond Special Education: Toward a Quality System for All Students," *Harvard Educational Review*, vol. 57, no. 4 (November 1987), p. 375; National Association of State Boards of Education, *Winning Ways: Creating Inclusive Schools, Classrooms and Communities* (May 1995), p. 9 (hereafter cited as NASBE, *Winning Ways*) (citing G. McGregor, "Inclusion: A Powerful Pedagogy," *Front Line*, vol. 2, no. 1 (1993), pp. 8–10).

Structure of the Educational System Serving Students with Disabilities: A Contemporary Debate

Although there is general support favoring placement of students with disabilities in the regular educational setting with nondisabled students to the greatest extent appropriate to their needs, a broader debate exists. This debate focuses on a number of issues, including the extent to which regular educational placement should occur, the extent to which the current structure for providing regular and special educational services is adequate, and whether there is a need for change.

Current Education System

Historically, the system of education has consisted of two programs: special education[38] and regular (or general) education.[39] The distinction between these two educational programs traditionally has extended beyond instructional settings. Most States and school systems maintain separate funding systems, budgets, and staff for special education.[40] Further, teacher training programs in higher education make distinctions between special education and regular education teacher training, and States generally recognize separate certification categories for special education teachers and regular education teachers.

In practice, the education of students with disabilities occurs in different ways (see table 6.1).

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[35] Van Dyke et al., "How to Build an Inclusive School," p. 477.

[36] Ibid. (citing G. McGregor, "Inclusion: A Powerful Pedagogy," *Front Line*, vol. 2, no. 1 (1993), pp. 8–10). *See also* The Council For Exceptional Children, *Integrating Students with Severe Disabilities*, Digest #E468 (Reston, VA), p. 1 (citing L. Voeltz, "Effects of Structures Interactions with Severely Handicapped and Non-Handicapped Students," *American Journal of Mental Deficiency*, vol. 86 (1982), pp. 380–90; S. McHale and R. Simeonsson, "Educating Students with Severe Disabilities in Regular Classes," *American Journal of Mental Deficiency*, vol. 85 (1980), pp. 18–24; Richard Brunelli, "Retarded Children Gain from Physical Program," *U.P.I.* (Sept. 5, 1989), BC cycle (stating that one study that involved disabled students in an inclusive physical education program observed that intellectually disabled students enjoyed participating and nondisabled peers' attitudes toward the disabled children was improved because of the increased contact); Sheila McKenna, "Brooklin Profile/Jackelyn Barnard," *Brooklyn Edition*, Newsday, INC., May 5, 1992, p. 28 (quoting Jackelyn Barnard, Health Coordinator at Public School No. 279 in New York City, and an advocate for disabled children, who stated that through inclusion she has been able to develop positive attitudes towards the disabled)).

[37] NASBE, *Winning Ways*, p. 9 (citing G. McGregor, "Inclusion: A Powerful Pedagogy," *Front Line*, vol. 2, no.1 (1993), pp. 8–10).

[38] The Individuals with Disabilities Education Act defines "special education" as "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability." Special education may include "classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions, and other settings." *See* Pub. L. No. 105–17, § 602(25) (1997).

[39] In addressing the meaning of "regular education programs," the DOEd's Office of Special Education Programs has noted the following in a policy letter: "[T]he phrase 'regular education programs' does not include classes composed solely of handicapped children taught by a regular education teacher. . . 'regular education classes with nonhandicapped children'—is more correct. Given the fact that schools are increasingly including a wider variety of children within a single class, it is possible that the line between regular education classes and other classes might become blurred. In general, however, we understand a regular education class to be one in which most students are not receiving 'specially designed instruction.'" G. Thomas Bellamy, Director, Office of Special Education Programs, DOEd, response to inquiry by Ellen Mancuso, Program Coordinator, Education Law Center, Inc., Jan. 20, 1987, 211 EHLR 433.

[40] Under Part B of IDEA States are required to account for funds.

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Students may reside in public or private educational facilities having specialized programs for the disabled, and the local public school system funds the cost of tuition. Students may attend such a facility as day students with transportation costs and tuition funded by the local school district. The public school system may transport disabled students to a school having specialized programs.

If students with disabilities attend their neighborhood schools with nondisabled students, the level of interaction with nondisabled students can vary. Students with disabilities may attend classes devoted to the disabled and to special education programs for all or part of the school day. They may attend regular classes for part of the day and participate in a pull-out program. In general, the current system of educating students with disabilities provides that removal of students with disabilities from the regular class for all or part of the school day is allowed only if the students' educational needs cannot be met in the regular education environment with the use of supplementary aid and services.

Regular Education Initiative and Full Inclusion

Two movements have called for fundamental changes in the current special education-regular education system. The first is commonly known as the Regular Education Initiative (REI). The second is known as the full inclusion movement. Both movements focus on the goal of integrating disabled and nondisabled students, but they are driven by more than the placement of disabled and nondisabled students in the same educational setting.

The REI has no single or precise definition. Instead, it is based on a set of propositions and proposals for reforming the relationship between special and regular education.[41] The REI supports fundamental changes in the education system. It evolved from a policy initiative by the former Assistant Secretary of the U.S. Department of Education, Madeleine Will,[42] and from the writings of education scholars.[43] There are differing views on the extent of change that would be necessary under the REI. One view is that the REI seeks to apply the concepts and techniques of special education in regular education, but does not require a consolidation of special and regular education altogether.[44] Another perspective on the REI suggests restructuring what has been called a "dual system" of special and general education to merge special and compensatory education[45] programs with regular education in a single structure.[46] There also are differing views on the extent to which the REI applies to *all* children with disabilities. A more limited perspective of the REI focuses on integrating students with milder, "high-incidence" forms of disabilities, such as learning disabilities and mental retardation, into the regular class.[47] A broader perspective emphasizes that the REI applies to all children with disabilities, regardless of the severity of the disability.[48]

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[41] James M. Kauffmann, "Restructuring in Sociopolitical Context: Reservations About the Effects of Current Reform Proposals on Students with Disabilities" in John Wills Lloyd, Nirbhay N. Singh, and Alan C. Repp, eds., *The Regular Education Initiative: Alternative Perspectives on Concepts, Issues, and Models* (Sycamore, IL: Sycamore Publishing Co., 1991), p. 57.

[42] Assistant Secretary Will noted limitations of the special education approach:
"At the heart of the special approach is the presumption that students with learning problems cannot be effectively taught in regular education programs even with a variety of support. Students need to be 'pulled out' into special settings where they can receive remedial services. Although well-intentioned, this so-called 'pull-out' approach to the educational difficulties of students with learning problems has failed in many instances to meet the educational needs of these students and has created, however unwittingly, barriers to their successful education. . . My point is that the language and terminology we use in describing our education system is full of the language of separation, of fragmentation, of removal. To the extent that our language reflects the reality of our system as many diverse parts never or rarely connected as a whole, it reflects a flawed vision of education for our children."
Madeleine Will, "Educating Children with Learning Problems: A Shared Responsibility," *Exceptional Children*, vol. 52 (February 1986), p. 412 (hereafter cited as Will, "Educating Children with Learning Problems").

[43] Donald D. Hammill, "A Brief Look at the Learning Disabilities Movement in the United States," *Journal of Learning Disabilities*, vol. 26, no. 5 (May 1993), p. 304. *See* Gartner and Lipsky, "Beyond Special Education," pp. 367–95; Susan Stainback and William Stainback, "Educating All Students in Regular Education," in Donald S. Marozas and Deborah C. May, *Issues and Practices in Special Education* (New York: Longman, Inc., 1988), pp. 8–10.

[44] *See* Will, "Educating Children with Learning Problems," p. 415. *See also* Siegel, *Least Restrictive Environment*, p. 32.

[45] Compensatory education is a term used for "at risk" students served under Title I of the Elementary and Secondary Education Act (formerly Chapter 1) of 1965, as amended.

Like the REI, the term full inclusion has several meanings and inferences.[49] Generally, the full inclusion movement seeks to include all children with disabilities in regular classes, regardless of the severity of their disability.[50] Full inclusion follows the broader perspective of the REI in calling for the consolidation of all children into a single educational program. Full inclusion continues to recognize the need for special educational *services* but not a separate special educational *placement*. Some scholars describe the differences between the REI and full inclusion as follows:

> the primary objective of the regular education initiative (REI) was to educate larger numbers of students having "high incidence" disabilities (e.g., learning disabilities, behavioral disorders, mild developmental disabilities) in general education settings and thereby increase *academic achievement*. . . . In contrast to the REI, the overriding objective of full inclusion is to increase the *social competence* of students with disabilities and foster positive peer and teacher relationships.[51]

Because there are various meanings for the REI, the difference between the REI and full inclusion may only be semantical. The "REI" had its origin in the 1980s, whereas inclusion is a term used frequently today. However, some see full inclusion as a major departure from REI because the REI supports some differential placement for students with disabilities based on their individual needs.[52]

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[46] *See* Alan Gartner and Dorothy Kerzner Lipsky, "Restructuring for Quality," in John Wills Lloyd, Nirbhay N. Singh, and Alan C. Repp, ed., *The Regular Education Initiative: Alternative Perspectives on Concepts, Issues, and Models* (Sycamore, IL: Sycamore Publishing Co., 1991), pp. 43–55; Stainback and Stainback, "Rationale for Integration," pp. 225–39. *See also* Kauffmann, "Restructuring in Sociopolitical Context," p. 57 (citing A. Gartner and D.K. Lipsky, *The Yoke of Special Education: How to Break It* (Rochester, NY: National Center on Education and the Economy, 1989); M.C. Wang, M.C. Reynolds, and H.J. Walberg, "Integrating the Children of the Second System," *Phi Delta Kappan* vol. 70, pp. 248–51).

[47] *See* Will, "Educating Children with Learning Problems," p. 411; Hill M. Walker and Michael Bullis, "Behavior Disorders and The Social Context of Regular Class Integration: A Conceptual Dilemma?" in John Wills Lloyd, Nirbhay N. Singh, and Alan C. Repp, eds., *The Regular Education Initiative: Alternative Perspectives on Concepts, Issues, and Models* (Sycamore, IL: Sycamore Publishing Co., 1991), pp. 75–93; The Executive Committee of the Council for Children with Behavioral Disorders, "Position Statement on the Regular Education Initiative," *Behavioral Disorders*, vol. 14 (May 1989), pp. 201–08 (hereafter cited as CCBD Position Statement on REI).

Some criticize generalized efforts to promote the REI or full inclusion because the empirical data on outcomes of these strategies focused only on "high incidence" populations, such as learning disabilities. As a consequence, any successful outcomes of the REI or full inclusion efforts for students with, for example, learning disabilities, are being generalized to apply to students with emotional or behavioral disorders. Timothy J. Lewis, David Chard, and Terrance M. Scott, "Full Inclusion and the Education of Children and Youth with Emotional and Behavioral Disorders," *Behavioral Disorders* (August 1994), p. 278 (hereafter cited as Lewis et al., "Full Inclusion"); Walker and Bullis, "Behavior Disorders and The Social Context," pp. 75–93.

[48] *See* Stainback and Stainback, "Educating All Students," pp. 8–10; Martha E. Snell, "Schools are For All Kids: The Importance of Integration for Students with Severe Disabilities and Their Peers," in John Wills Lloyd, Nirbhay N. Singh, and Alan C. Repp, eds., *The Regular Education Initiative: Alternative Perspectives on Concepts, Issues, and Models* (Sycamore, IL: Sycamore Publishing Co., 1991), pp. 132–47; Gartner and Lipsky, "Beyond Special Education," pp. 367–95.

[49] *See* Lewis et al., "Full Inclusion," p. 277.

[50] William Stainback and Susan Stainback have described inclusive schooling as "the inclusion of *all* students in the mainstream of regular education classes and school activities with their age peers from the same community." Stainback and Stainback, "Rationale for Integration," p. 225. *See also* Kirk et al., *Educating Exceptional Children*, pp. 66–70.

[51] Lewis et al., "Full Inclusion," p. 278 (emphasis in original).

The concept of "full inclusion" is distinct from "inclusion." The terms differ in the amount of separate or special education placement they permit. Full inclusion includes all students with disabilities in the regular education program, without exception. Inclusion provides that students with disabilities are placed in regular classes as much as possible, thus, suggesting that there may be circumstances when the educational needs of a student or other factors require placement of that student in a separate setting. In analyzing Federal law, regulations, and policies, the concept of inclusion is consistent with the requirements of the IDEA and section 504, specifically the provisions requiring placement of students with disabilities in the "least restrictive environment." In a policy letter, the U.S. Department of Education's (DOEd) Office of Special Education Programs (OSEP) noted, "Federal law does not use the term 'inclusion'; consequently, the Department has not defined this term. Generally, inclusion is regarded as an instructional strategy or methodology involving the placement of disabled students in regular educational environments. While its implementation may vary among educators, inclusion can be promoted consistent with the requirements of Part B [of the IDEA]."[53]

However, the concept of full inclusion, as defined above, is broader than current provisions in the IDEA, section 504, their regulations, or U.S. Department of Education policies. In a policy letter, OSEP indicated that "Part B [of the IDEA] does not require that every student with a disability be placed in the regular classroom regardless of individual abilities and needs. This recognition that regular class placement may not be appropriate for every disabled student is reflected in the requirement that school districts make available a range of placement options, known as a continuum of alternative placements, to meet the unique educational needs of students with disabilities."[54] In light of the broad definition of full inclusion discussed above, implementation of this principle in schools may not necessarily be consistent with current Federal law.

Summary of the Debate

From a general perspective, the current debate about special education presents a continuum of arguments: one for the status quo, another for the REI, and others for inclusion or full inclusion.[55] Supporters of the status quo note that the current approach to educating children with disabilities, which distinguishes between special and regular education, works to ensure that children with disabilities have an education tailored and appropriate to their needs in the regular educational environment. Children with disabilities should be members of the regular class, or the least restrictive environment, because schools must provide services necessary to facilitate such placement. Under this argument, the maintenance of special education settings and services ensures that the needs of the child are met. The preference for placement in regular classes facilitates the integration of students with disabilities and their nondisabled peers, communication and understanding between the two groups of students, and preparation for the work world and community life. Advocates of the status quo contend that this approach balances aspirations with reality.[56]

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[52] *See* Kirk et al., *Educating Exceptional Children*, pp. 66–67.

[53] Thomas Hehir, Director, Office of Special Education Programs, DOEd, response to inquiry by Ray LaHood, U.S. House of Representatives, Apr. 6, 1995, 23 IDELR 558 (hereafter cited as Hehir response to Lahood inquiry, 23 IDELR 558). Courts decisions have interpreted the IDEA has requiring inclusion. *See* "Inclusion: Good For Students, or Simply P.C.," *Daily Report Card*, Sept. 12, 1994.

[54] Hehir response to Lahood inquiry, 23 IDELR 558.

[55] Some scholars have presented the debate as a continuum of viewpoints. *See* Douglas Fuchs and Lynn S. Fuchs, "Framing the REI Debate: Abolitionists Versus Conservationists," in John Wills Lloyd, Nirbhay N. Singh, and Alan C. Repp, ed., *The Regular Education Initiative: Alternative Perspectives on Concepts, Issues, and Models* (Sycamore, IL: Sycamore Publishing Co., 1991), pp. 241, 243, 244.

They acknowledge that some circumstances warrant separate or less integrated placements to meet the needs of students. In addition, they argue that improvements need only be made within the current structure. The main issue with which they are concerned is reforming the current system to address problems that reflect a failure to fulfill the full intent of the law.[57]

Supporters of reform note that the current, divided structure of the education system places unnecessary labels on students with disabilities. They contend that the system perpetuates a dichotomy of disabled and nondisabled students. In addition, they argue that it focuses incorrectly on the differences between the disabled and nondisabled instead of acknowledging the uniqueness of each child.[58] As some advocates of this position have noted, "[c]hildren are more alike than different, and [a]ll children differ one from another. . . . Thus, it is neither appropriate nor efficacious to divide students for instructional purposes between those labelled as handicapped and those not."[59] Advocates of this argument maintain that all students should receive education in one mainstreamed educational program setting with no categorical distinctions of students as disabled, nondisabled, slow-learners, average learners, above-average learners, or gifted. They contend that only this type of complete integration will facilitate an understanding of and accepting attitudes toward differences, ensure full preparation for community and work life, and promote nondiscrimination and equity.[60]

Those favoring the status quo argue that perspectives like the REI, inclusion, and full inclusion focus predominantly on the concept of placement, thus disregarding the true needs of the child.[61] In 1993, three major learning disabilities organizations offered their criticisms of full inclusion. The Council on Learning Disabilities wrote,

> One policy that the Council cannot support is the indiscriminate full-time placement of all students with LD in the regular education classroom . . . . The Council cannot support any policy that minimizes or eliminates service options designed to enhance the education of students with LD and that are guaranteed by the Individuals with Disabilities Education Act.[62]

In its position paper, the Learning Disabilities Association of America (LDA) noted that it

> does not support "full inclusion" or any policies that mandate the same placement, instruction, or treatment for all students with learning disabilities . . . decisions regarding educational placement of students with disabilities must be based on the needs of each individual student rather than administrative convenience or budgetary considerations and must be the

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[56] Hill M. Walker and Michael Bullis emphasize their belief that students with disabilities should be educated in the least restrictive environment available to them, to the maximum extent possible. They suggest that effective implementation of REI is unrealistic. According to them, "[T]he regular education enterprise seems already stressed to the breaking point in accommodating its current mandate and expectations. . .The REI will severely exacerbate this situation." Walker and Bullis, "Behavior Disorders and The Social Context," pp. 75, 85, 88.

[57] Walker and Bullis argue that reform efforts "should aggressively focus on the improvement of program practices, regardless of the setting or context in which they are delivered." Ibid., p. 88.

[58] *See* Gartner and Lipsky, "Restructuring for Quality", pp. 44–45, 48 (contend that the goal should be to craft for each student an individualized education program from which she or he can benefit and "[t]his can only be done in an integrated or unitary system."); Maynard C. Reynolds, "Classification and Labeling" in John Wills Lloyd, Nirbhay N. Singh, and Alan C. Repp, eds., *The Regular Education Initiative: Alternative Perspectives on Concepts, Issues, and Models* (Sycamore, IL: Sycamore Publishing Co., 1991), pp. 38–39.

[59] Gartner and Lipsky, "Restructuring for Quality," pp. 44–45.

[60] *See* Stainback and Stainback, "Rationale for Integration," p. 225.

[61] *See* James M. Kauffman, John Wills Lloyd, John Baker, and Teresa M. Riedel, "Inclusion of All Students with Emotional or Behavioral Disabilities? Let's Think Again," *Phi Delta Kappan* (March 1995), p. 542.

[62] Council for Learning Disabilities, "Concerns About the Full Inclusion of Students with Learning Disabilities in Regular Education Classrooms," *Journal of Learning Disabilities*, vol. 26, no. 9 (November 1993), p. 595.

> results of a cooperative effort involving the educators, parents, and the student when appropriate."[63]

Further, it considered full inclusion "as great a violation of IDEA as is the placement of all children in separate classrooms on the basis of their type of disability."[64] Similarly, the National Joint Committee on Learning Disabilities (NJCLD) could not support the idea that all students with learning disabilities must be served only in regular classrooms. According to the Committee, "full inclusion, when defined this way, violates the rights of parents and students with disabilities as mandated by the Individuals with Disabilities Education Act (IDEA)."[65] It reasoned that "[b]ecause each student with learning disabilities has unique needs, an individualized program must be tailored to meet those needs. For one student, the program may be provided in the regular classroom; yet for another student, the regular classroom may be an inappropriate placement. Therefore, the NJCLD supports the use of a continuum of services and rejects the arbitrary placement of all students in any one setting."[66]

Advocates of full inclusion, however, emphasize that "[f]ull inclusion does not mean that all students should be *dumped* into the mainstream without appropriate programs and support to meet their individual needs. . . . To achieve success, full inclusion of all available educational resources and support into the educational mainstream will be needed."[67] They point out that full inclusion will not mean that special educators are unnecessary; rather, special and regular educators and resources will work together to "become a natural, integral part of the regular education mainstream."[68]

In reaction to criticism that the REI and full inclusion are unrealistic,[69] advocates of reform point to models that have been implemented in schools to facilitate full inclusion of students with diverse needs in the regular classroom.[70] For example, behavioral consultation offers a means of improving indirect delivery of services to students with special needs by providing consultative support and assistance to teachers.[71] Direct instruction uses a highly structured approach to instruction and a nontraditional sequence of topic presentation in teaching mathematics to students of diverse needs and abilities.[72] Cooperative learning facilitates the instruction for heterogeneous groups of students within the same class and shifts from the traditional teacher-instructor approach to one in which students guide themselves and each other.[73] According to some scholars, other models have potential to facilitate the full inclusion of students with diverse needs and abilities into the same classroom, even though these models were not designed with that specific purpose.[74] Supporters of full inclusion argue that the existence of all of these models demonstrates that full inclusion is a feasible concept limited only by the hesitancy or unwillingness of schools to change current structures and approaches.[75] In addition, they argue that the costs of integration are modest, with potential savings resulting from fewer due process hearings, fewer mediations, fewer referrals to special education, fewer nonpublic school placements, and lower transportation costs.[76] One of the benefits purported to result from a fully inclusive educational system is less bureaucratic obstacles when changing programs. In a unified system, "all students' needs can be identified and addressed without their having to be designated 'disabled' and in which movement from one program to another can be accomplished without tremendous bureaucratic upheaval."[77] Supporters of the status quo, however, question the reported success of these models.[78]

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[63] Learning Disabilities Association of America, "Position Paper on Full Inclusion of All Students with Learning Disabilities in the Regular Education Class," *Journal of Learning Disabilities*, vol. 26, no. 9 (November 1993), p. 594.

[64] Ibid.

[65] National Joint Committee on Learning Disabilities, "A Reaction to Full Inclusion: A Reaffirmation of the Right of Students with Learning Disabilities to a Continuum of Services," *Journal of Learning Disabilities*, vol. 26, no. 9 (November 1993), p. 596.

[66] Ibid.

[67] Stainback and Stainback, "Rationale for Integration," pp. 225–26.

[68] Ibid., p. 226. *See also* Van Dyke et al., "How to Build an Inclusive School," p. 476 ("When inclusion was first initiated in some school systems, the myth existed that special educators would no longer be needed. . . This is very far from the truth. Indeed, the role of the special educator is crucial.").

[69] *See* CCBD Position Statement on REI, p. 206 ("Advocates of the REI frequently fail to recognize the magnitude and difficulty of the task of accommodating all students appropriately in general education. . . ").

[70] *See, e.g., Inclusive Education Programs*, vol. 3, iss. 3 (March 1996) (describing how, in practice, local school districts have implemented various inclusion practices into educational policy).

[71] Joni Alberg, "Models for Integration," in John Wills Lloyd, Nirbhay N. Singh, and Alan C. Repp, eds., *The Regular Education Initiative: Alternative Perspectives on Concepts, Issues, and Models* (Sycamore, IL: Sycamore Publishing Co., 1991), p. 212. *See* Thomas R. Kratochwill and Susan M. Sheridan, "Behavioral Consultation in Educational Settings," in John Wills Lloyd, Nirbhay N. Singh, and Alan C. Repp, eds., *The Regular Education Initiative: Alternative Perspectives on Concepts, Issues, and Models* (Sycamore, IL: Sycamore Publishing Co., 1991), pp. 193–210 (discussing behavioral consultation).

Prior to enactment of section 504 and the IDEA, separate special education facilities were the norm for students with disabilities, regardless of the degree of those disabilities.[79] Indeed, the substandard conditions that existed in such institutions were a major impetus behind the growth of the Federal commitment to regulate special

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[72] Alberg, "Models for Integration," p. 212. *See* Douglas Carnine, "Increasing the Amount and Quality of Learning Through Direct Instruction: Implications for Mathematics," in John Wills Lloyd, Nirbhay N. Singh, and Alan C. Repp, eds., *The Regular Education Initiative: Alternative Perspectives on Concepts, Issues, and Models* (Sycamore, IL: Sycamore Publishing Co., 1991), pp. 163–75, for a discussion of this model.

[73] Alberg, "Models for Integration," p. 212. *See* Robert E. Slavin and Robert J. Stevens, "Cooperative Learning and Mainstreaming," in John Wills Lloyd, Nirbhay N. Singh, and Alan C. Repp, eds., *The Regular Education Initiative: Alternative Perspectives on Concepts, Issues, and Models* (Sycamore, IL: Sycamore Publishing Co., 1991), pp. 177–91; Van Dyke et al., "How to Build an Inclusive School" p. 477.

[74] These models include the High/Scope Curriculum model, the Strategies Intervention Model, Tactics for Thinking, the Contingencies for Learning Academic and Social Skills (CLASS) program, the Learning Styles Model, Classwide Student Tutoring Teams (CSTT), the Comprehensive Local School (CLS), the Coalition of Essential Schools. *See* Alberg, "Models for Integration," pp. 213–20. Alberg notes that there are many additional models to assist schools in integrating students with diverse needs and abilities in the same classroom setting. However, some models have more well-documented effectiveness than others. Ibid., p. 220.

[75] *See* National Council on Disability, *Improving Implementation of the Individuals with Disabilities Education Act*, p. 76 (presenting comments of Toni Robinson who testified at the Charlotte, NC, field hearing: "Over the last year, I have learned that IDEA works, and the least restrictive environment language in IDEA, in my opinion is just fine as it is. I can tell you that supported inclusion, which entails support for students and parents, for my kid, I can tell you that it works, period.").

[76] *See* ibid., p. 80.

[77] Beth Harry, Norma Allen, and Margaret McLaughlin, "Communication Versus Compliance: African-American Parents' Involvement in Special Education," *Exceptional Children*, vol. 61 (February 1995), p. 364. *See* The Center for Policy Options in Special Education, Institute for the Study of Exceptional Children and Youth, University of Maryland at College Park, *Issues & Options in Restructuring Schools and Special Education Programs*, September 1992.

[78] *See* CCBD Position Statement on REI, p. 205 ("Evidence regarding the effectiveness of programs designed to serve handicapped students in general education is mixed. It is premature to conclude that programs fully integrated with general education are typically successful or can be made successful by virtue of their structure.").

[79] *See* chap. 2, pp. 10–16 of this report; Vicki M. Pitasky, *The Current Legal Status of Inclusion* (Horsham, PA: LRP Publications, 1996), p. 27.

education.[80] Nonetheless, the fundamental guarantee and premise of both section 504 and IDEA is a "free appropriate public education" (FAPE). Thus, when an inclusive placement interferes with the provision of FAPE, it will not be an appropriate placement for the student.[81] The fundamental rule is that the appropriateness of any inclusive placement depends on the individual needs of each student and whether they can be met in the regular classroom.[82]

Reality of Placements in Regular Classes

Despite the support for placement of students with disabilities in regular classrooms, a large number of students with disabilities receive some of their education outside of a regular class setting.[83] In the 1992–1993 school year, 95 percent of 6- to 21-year-old students with disabilities receiving special education and related services through the IDEA or Title I of the Elementary and Secondary Education Act[84] received their education in regular schools.[85] 39.8 percent, however, receive most of their education in regular classrooms.[86] 31.7 percent received their education in regular classes and resource rooms, and 23.5 received their instruction in separate classes.[87]

Of the 39.8 percent of the students with disabilities, aged 6 through 21, receiving some education in regular classes, 34.8 percent of the students with disabilities in regular classes were identified as having specific learning disabilities; 19.6 percent were identified as having serious emotional disturbance; and 7.1 percent were identified as having mental retardation.[88] However, there are no national data on the number of students, having received special education services, who have returned to full-time placement in the regular class.[89] In addition, there are continued complaints by parents that their children do not have access to regular schools and classrooms, nor placement in settings close to their homes.[90]

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[80] *See* chap. 2, pp. 10–16; Pitasky, *The Current Legal Status of Inclusion*, p. 27. *See also* Marca Bristo, Chairperson, National Council on Disability, testimony before a Joint Hearing of the United States Senate Committee on Labor and Human Resources, Subcommittee on Disability Policy and the United States House of Representatives Committee on Economic and Educational Opportunities Subcommittee on Early Childhood, Youth and Families on The 20th Anniversary of the Individuals with Disabilities Education Act, May 9, 1995 (hereafter cited as Bristo testimony).

[81] Pitasky, *The Current Legal Status of Inclusion*, p. 27. *See* Susan Brody Hasazi, A.P. Johnston, Annette M. Liggett, and Richard A. Schattman, "A Qualitative Policy Study of the Least Restrictive Environment Provision of the Individuals with Disabilities Education Act," *Exceptional Children*, vol. 60, no. 6 (May 1994), p. 491.

[82] *See* Pub. L. No. 105–17, § 612(a)(5) (1997); 34 C.F.R. § 300.550(b)(2) (1996); 34 C.F.R. § 104.34(a)–(b) (1996).

[83] "Overall, 74 percent of special education students are in pull-out or separate programs." Gartner and Lipsky, "Beyond Special Education," p. 374. *See also* David M. Engel, "Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference," *Duke Law Journal* (1991), pp. 166, 176; Richard H. Good, III, Kathleen Rodden-Nord, and Mark R. Shinn, "Effects of Classroom Performance Data on General Education Teacher's Attitudes Toward Reintegrating Students with Learning Disabilities," *School Psychology Review*, vol. 21, no. 1 (1992), p. 138 (hereafter cited as Good et al., "Effects of Classroom Performance Data").

[84] Chapter 1 of the Elementary and Secondary Education Act (ESEA) originally included a program to serve children with disabilities. However, in October 1994, the Congress eliminated the program when passing the Improving America's School Act that reauthorized the ESEA. The IDEA also was amended so that, beginning in fiscal year 1995, funding for special education and related services for all eligible students with disabilities would be provided under IDEA's Part B (State grants) and Part H (Early Intervention for Infants and Toddlers with Disabilities) programs. Pub. L. No. 103–382, 108 Stat. 3931–3936 (1994). The *Seventeenth Annual Report to Congress on the Individuals with Disabilities Education Act* includes data for children served under the Chapter 1 (SOP) Handicapped Program for Federal fiscal year 1994 (school year 1993–1994). DOEd, *1995 IDEA Report*, p. 1.

[85] DOEd, *1995 IDEA Report*, p. 14.

[86] Ibid. The U.S. Department of Education defines regular classroom placement as including students who receive the majority of their education program in a regular classroom and receive special education and related services outside the regular classroom for less than 21 percent of the school day. Ibid., p. 13. Therefore, the report of 39.8 percent does not reflect full-time placement in a regular classroom. Presumably, a smaller percentage of students with disabilities receive education in regular classes full-time.

[87] Ibid., p. 14. See notes 11 and 12 above for the U.S. Department of Education's definitions of placement in resource rooms and placement in separate classes. The resource room is not a placement—the child is placed in regular classes with varying amounts of time spent in the resource room.

Barriers to a Regular Education Placement

Behavior Problems in the Regular Classroom

One of the greatest difficulties in maintaining a primary objective to place students with disabilities in regular classes is balancing the need to address the educational needs of students with disabilities who are disruptive or aggressive with the need to maintain order and ensure safety in the classroom.[91] The characteristics and personalities of students with learning disabilities, mental retardation, behavioral disabilities, or serious emotional disturbance vary based on the unique character of each student and the nature of their disability. Thus, not all students with these types of disabilities behave in a disruptive or aggressive manner in the regular class. However, certain indicators or symptoms of some of these disabilities can manifest themselves as disruptive or aggressive behavior. For example, although some students with serious emotional disturbance are withdrawn and nonaggressive, others can be disruptive or aggressive.[92] When a student with a disability exhibits behavior problems in the regular class or school, Federal law and regulations require that the school district consider the range of supplementary aids and services available so that the student can remain in the regular educational setting.[93] If a child with a disability is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the child with a disability cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs.[94]

As schools make decisions on the placement of students with disabilities who are disruptive or aggressive in the classroom, they can face difficult decisions. They must consider what educational program and setting will best meet the needs of the student who has a disability. For example, in some situations, a setting in which the student with a disability has exposure to other students

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[88] Ibid., p. 17. The U.S. Department of Education did not offer percentage for students identified as having "behavior disabilities" because it has not been a disability category under IDEA. Ibid.

[89] Gartner and Lipsky, *Beyond Separate Education*, p. xxv.

[90] *See* "Parents Challenge Fairfax Schools," *The Washington Times*, Oct. 16, 1996, pp. D1, D7 (reporting that a group of parents in Fairfax County, VA, had filed a discrimination suit against the Fairfax County school system claiming that the school system had violated Federal civil rights law by routinely placing many students with disabilities in separate facilities without considering regular education or proximity to home as options).

[91] *See* Walker and Bullis, "Behavior Disorders and The Social Context," pp. 75–93. Walker and Bullis note, "the REI does not apply uniformly across handicapping conditions, and that for students with serious behavior disorders it creates particular problems." Ibid., p. 76. *See also* Van Dyke et al., "How to Build an Inclusive School," p. 477.

[92] *See* chap. 2, pp. 25–29.

[93] Provisions in law and regulations limit school discretion to discipline or remove students with disabilities from classes. In particular, students with disabilities and their parents have the right to challenge a school's decision to discipline the student regardless of whether the conduct is related or unrelated to the student's disabilities. *See* Pub. L. No. 105–17, § 615(k) (1997); 34 C.F.R. §§ 300.504, 300.506, 300.508 (1996); 34 C.F.R. §§ 104.33(b)(1)(ii), 104.36 (1996). If a student with a disability and the parents challenge the school's decision and seek a due process hearing, the student must remain in the current educational placement unless the State educational agency, school district, and parents agree otherwise. Pub. L. No. 105–17 §, 615(k)(7)(A) (1997); and 34 C.F.R. § 300.513(a) (1996). *See* 34 C.F.R. § 104.36 (1996). *See also* Weber, *Special Education Law and Litigation Treatise*, pp. 13:8–13:10.

[94] 34 C.F.R. § 300.553 and Comment, 34 C.F.R. Part 104, appendix, para. 24.

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can help the student to gain social skills and become less disruptive or aggressive. In other situations, the exposure can create a distracting learning environment for the student. In addition to the individual student's needs, schools also must address classroom and school safety concerns. They must consider whether the educational needs of other students in the class will be negatively affected by the disruptiveness of the student with the disability. Schools also may be influenced by the support, or lack thereof, for placing students with disabilities who are aggressive or disruptive in the regular class.[95] Therefore, even if the student's educational needs are best met in a regular class, schools consider various interests, and their decisions on placement may be influenced appropriately or inappropriately by a variety of factors. School placement decisions should not be influenced by noneducational factors.

Educational scholars are concerned that schools, in considering this balance, will all too often determine that other factors outweigh the interest of supporting a student with a disability in the regular class.[96] Although it is debatable whether this is the most appropriate decision, it is clear that the question of placing a student with a disability who is disruptive or aggressive in the regular class requires serious consideration of many factors and a true understanding of the student's needs. Several sources, however, cite problems in fulfilling these goals. According to one scholar, a school's reliance on the stereotype associated with a particular disability often leads to a "rush to judgment" about the student. Some educators may view the disruptive or disturbing behavior of children with emotional disabilities in one of two ways. Either they see the student as willfully ill-behaved and deserving of punishment which may lead to removal from the regular class, or they view the student as seriously ill and in need of medical treatment outside of the school or regular class.[97] There also is concern that a school may place the student outside the regular class to avoid providing the resources and instruction necessary to facilitate that student's regular class

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[95] A 1994 poll on the public's attitudes toward public schools questioned individuals on how important they considered efforts to deal with troubled or emotionally disturbed students in the regular classroom as a cause for increased violence in public schools over the last decade. Fifty-one percent of the 1,326 adults surveyed considered this very important, and 27 percent considered this quite important. Stanley M. Elam, Lowell C. Rose, and Alec M. Gallum, "The 26th Annual Phi Delta Kappan/Gallup Poll of the Public's Attitudes Toward the Public Schools," *Phi Delta Kappan* (September 1994), p. 44.

[96] Bill Thomas, a resource consultant for Young Adult Services at Brown School in South Bend, IN, responds to Pete Idstein's article "Swimming Against the Mainstream." *See* Pete Idstein, "Swimming Against the Mainstream," *Phi Delta Kappan* (December 1993), pp. 336–40. Thomas criticizes Idstein's efforts to place a disabled student, who was disruptive in the regular class, in a more segregated placement. According to Thomas, Idstein's description "displays no real understanding of Ronald's educational needs and little interest in his rights to equal educational opportunity." Bill Thomas, "Education Should Be Special for All," *Phi Delta Kappan* (May 1994), p. 716 (hereafter cited as Thomas, "Education Should Be Special"). Further, Idstein's article "is an example of the systemic weaknesses that reflect the need to combine both general and special education into a more substantial system of education for all." Ibid. According to Thomas, "Instructional delivery and learning environment need to be designed to fit students' styles, needs, and characteristics—not the other way around. The process of education can be more effective and ultimately more efficient when a student-centered mainstream is created in an environment that promotes learning for all students." Ibid., p. 717. *But see* Pete Idstein, Patricia Gizzi, Katy Ferrero, and Sue Miller, "There Are Others in the Mainstream," *Phi Delta Kappan* (May 1994), pp. 718–20 (hereafter cited as Idstein et al., "There Are Others in the Mainstream"). This article was in response to Thomas. Idstein point outs that although placement in regular classes should be the primary objective, it should not cut off the option to place students in more segregative settings if such placements are the only means to meet the needs of the student and to ensure that all students are treated equally. Ibid., p. 719. He states that in the case of Ronald removal from the regular class was the best option. Further, within 2 years, Ronald was able to reenter and remain successfully in the regular class setting. Ibid., p. 720.

[97] *See* Theresa Glennon, "Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities," *Tennessee Law Review* (vol. 69), pp. 295, 296 (Winter 1993) (hereafter cited as Glennon, *Disabling Ambiguities*).

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placement.[98] There is a third view that a school may not consider reasons for the student's disruptiveness such as its failure to properly identify and understand the student's needs and support those needs. For example, in some circumstances, the inadequacies in the existing educational program have been cited as a partial cause for the student's behavior.[99]

In enacting and interpreting the Federal provisions in section 504 and the IDEA, there has been recognition of the various considerations that schools must take into account when placing students with disabilities who are disruptive or aggressive in the regular class. For example, the appendix to the section 504 regulations states:

> Although under § 104.34, the needs of the handicapped person are determinative as to proper placement, *it should be stressed that where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired*, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by § 104.34.[100]

Likewise, in court cases that have involved the removal of a disruptive student with a disability from a regular education setting, the courts have based their decisions, in part, on evaluating the effects of the student's disability on the teacher and the other students in the regular classroom.[101]

Various changes to the IDEA also reflect the growing difficulties faced by schools in balancing the need to include students with disabilities in regular educational environments, yet also ensure safety and order in the schools. For example, in 1975, when the IDEA was first enacted as the Education for All Handicapped Children Act, Congress created specific procedural safeguards which apply prior to a change in the educational placement of a student with a disability to ensure that the students cannot summarily be removed from class or school.[102] A school proposing to remove a student with a disability from a regular class or school for more than 10 days because of the student's conduct must provide written notice to the parents prior to changing the placement and determine whether the misconduct is a manifestation of the disability. If they determine it is a manifestation of the student's disability, the student can be removed from school.[103] In addition, if the parents initiate due process, the student must be kept in his or her current educational placement pending a hearing on the matter.[104] Concern about violence in the schools has resulted in one qualification to that provision. In 1994, Congress added a section to the IDEA permitting removal of a student from the current setting if he or she brings a weapon to the school.[105] Under such circumstances, the school may remove the student to an alternative educational setting for no more than 45 days.[106]

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[98] Some educators argue that if a school makes all efforts to accommodate the disabled student in the regular class, the school then takes away from the needs of the other students. The urge for full accommodation of students with disabilities who are disruptive in the regular class resound an "Orwellian message: all children are entitled to an equal educational opportunity, but some children are more equal than others." Idstein et al., "There Are Others in the Mainstream", p. 719.

[99] *See* Thomas, "Education Should Be Special," p. 717. (In response to Pete Idstein's 1993 article "Swimming Against the Mainstream," in which he recounted efforts to accommodate a disruptive student with disabilities in a regular setting, Bill Thomas notes that Idstein's description "displays no real understanding of Ronald's educational needs and little interest in his rights to equal educational opportunity.") Ibid.

[100] 34 C.F.R. Pt. 104, App. A, Subpt. D, no. 24 (1996) (emphasis added).

[101] *See* Sacramento Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994). In that case the ninth circuit established a four-part test for determining whether a student with a disability was placed in the least restrictive environment. The court considered (1) the academic benefits of placement in a mainstream setting; (2) the nonacademic benefits of mainstream placement; (3) the effects of the student on the teacher and the other students; and (4) the comparative cost. 14 F.3d at 1404. *See* discussion in Perry A. Zirkel, "W(h)ither Full Inclusion?" *Phi Delta Kappan* (January 1995), p. 416. *See also* pp. 164–66 above (discussing *Oberti* and *Daniel R.R.*).

[102] *See* Education for All Handicapped Children Act, Pub. L. No. 94–142 § 5(a), 89 Stat. 773 (1975).

[103] *See* Pub. L. No. 105–17, § 615(k) (1997). The Department's Discipline Q & A's issued in April 1995 address requirements under IDEA and section 504 and Title II of the ADA relevant to disciplining students with disabilities.

Continued concerns about the ability to control violence in the classroom and school prompted Congress to reform the IDEA. With the IDEA Amendments of 1997, Congress expanded the list of offenses for which a school could remove a student with a disability from the classroom and place them in "interim alternative educational settings." In addition to bringing weapons to school or a school function, the list now includes circumstances where "the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local educational agency."[107] The revisions to the IDEA allow schools to suspend, for up to 45 days, students with disabilities who carry weapons to school or a school function, or who knowingly possesses or uses illegal drugs or sells or solicits them.[108] After this initial disciplinary action, if the IEP team and other qualified personnel determine through a "manifestation determination review"[109] that the behavior of the child with a disability was not a manifestation of the child's disability "the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities."[110]

Under the changes to the IDEA in the 1997 amendments, an impartial hearing officer can uphold the decision of school personnel or himself or herself "order a change in the placement of a child with a disability to an appropriate interim alternative setting" for up to 45 days.[111] In order to do so, the hearing officer must determine "by substantial evidence" that maintaining the child in his or her current educational placement is "substantially likely to result in injury to the child or to others."[112] The legislative history of the IDEA Amendments of 1997 explains that in creating this standard, Congress was codifying a legal standard established by the Supreme Court.[113] The House report accompanying the bill offered the following detailed explanation of the standard codified in the bill:

> The standard "substantially likely to result in injury to the child or others" codifies the standard established by the Supreme Court in *Honig v. Doe.* The bill requires the impartial hearing officer to consider the appropriateness of the child's placement and efforts by the school district to minimize the risk of harm in the child's current placement, including through use of supplementary aids and services. If the school district has failed to provide the child an appropriate placement or to make reasonable efforts to minimize the risk of harm, the appropriate response by an impartial hearing officer is to deny the school district's request to move the child to an alternative setting and to require the district to provide an appropriate placement and make reasonable efforts to minimize the risk of harm.

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[104] *See* Pub. L. 105–17, § 615(k)(7)(A) (1997).

[105] Improving America's Schools Act, Pub. L. No. 103–382 § 314(a)(1)(B), 108 Stat. 3936 (1994).

[106] Pub. L. No. 105–17, § 615(k)(1)(A)(ii) (1997).

[107] *Id.*

[108] *Id.*

[109] *See id.*, § 615(k)(4)(A)–(C) (1997).

[110] *Id.* § 615(k)(5)(A) (1997).

[111] *Id.* § 615(k)(2) (1997).

[112] *Id.* § 615(k)(2)(A) (1997).

[113] *See* H.R. Rep. No. 105–95, at 109 (1997).

Thus, it will not be permissible to move a child when the child's behavior can be addressed in the current placement.[114]

Financial Incentives for Separate Placements

States have different policies and procedures for determining allocations of State special education funding to local school districts. The bases for these funding formulas differ due to varying local contexts and policy objectives.[115] In general, most States use one of five types of special education funding formulas.

1. **Flat Grants Per Teacher or Classroom Unit**—These formulas provide districts a fixed amount of money for each special education service or for each classroom unit needed. They are needs-based formulas.
2. **Percentage or Excess Cost Formulas**—These formulas provide districts reimbursement for a percentage of the cost of educating students classified as having disabilities. They are cost-basis formulas. The reimbursements may be provided as a percentage of full costs or for costs that are above average per pupil costs for general education.
3. **Percentage of Teacher/Personnel Salaries**—These formulas provide districts with a percentage of the salaries of special education teachers and/or other special education personnel. They are resource-based in that they rely on the number and type of staff hired to serve students with disabilities. The percentage of funding that is provided may vary by personnel type.
4. **Weighted Pupil Formulas**—These formulas pay districts a multiple of the average per pupil costs or other base rate, depending on the pupil's disability classification and/or program. If they rely on pupil costs, they are cost-basis formulas.
5. **Weighted Teacher/Classroom Formulas**—These formulas pay districts an amount based on a multiple of allowable teachers or classroom units. The formulas are resource-based because they rely on the number of teachers or classes required to educate students with disabilities.[116]

Most States use the weighted-pupil formula or the percentage/excess-costs formula.[117] The weighted-pupil formula allows for larger allocations of funding if students are identified as within a disability category that often requires more costly special education services or placements.[118] According to some education researchers, many States increase their funding to school districts based on the type of educational place-

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[114] *Id.*

[115] Thomas B. Parrish, *Special Education Finance: Past, Present, and Future* (Palo Alto, CA: Center for Special Education Finance, 1996), p. 4

[116] National Association of State Boards of Education, *Winners All: A Call for Inclusive Schools*, p. 31 (hereafter cited as NASBE, *Winners All*) (citing the National Association of State Directors of Special Education). *See also* Rebecca W. Goldman, "A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act," *Dayton Law Review* (vol. 20, 1994) p. 264 (1994) (hereafter cited as Goldman, "Promises Made"); Gartner and Lipsky, "Beyond Special Education," pp. 372–74; Suzanne S. Magnetti, "Some Potential Incentives of Special Education Funding Practices," in Kirby A. Heller, Wayne H. Holtzman, and Samuel Messick, eds., *Placing Children in Special Education: A Strategy for Equity* (Washington, DC: National Academy Press, 1982), pp. 310–14 (discussing funding formulas).

[117] *See* NASBE, *Winners All*, p. 31; DOEd, *1995 IDEA Report*, pp. 117–19 (reporting on a 1994–1995 CSEF survey of State educational agencies which showed that pupil-weights were the most common funding approach) (As of December 1996, CSEF had not published the 1994–1995 survey).

[118] *See* NASBE, *Winners All*, p. 30; Gartner and Lipsky, "Beyond Special Education," pp. 374–75 (States with the highest percentage of students who were classified as learning disabled, speech impaired, mentally retarded, or emotionally disturbed and who were placed in regular classes used a cost basis funding formula. In all but one case, the States with the lowest percentages of these students placed in regular classes used a unit basis funding formula.). *See also* Magnetti, "Some Potential Incentives," p. 303 (discussing this provision), pp. 311–13.

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ment setting or the type of disability usually requiring more costly placements or programs.[119] For example, studies found that New York State provides more funding to local school districts for students who are identified as having severe disabilities and who are typically placed in expensive institutional settings independent of the public school systems.[120] In addition, there is a report that local school districts in Texas receive 10 times more for teaching special education students in separate classrooms than in classrooms with other students.[121]

An advantage of weighted-pupil formulas that base weights on placement or services, as well as percentage or excess-cost formulas, is that they are more closely linked than other types of formulas to actual program costs.[122] There are concerns, however, that the weighted-pupil funding formulas create incentives to place students with disabilities in separate classes, schools, or private facilities,[123] and, in effect, discourage local school districts from retaining students with mild disabilities in the general education environments and providing them with instructional modifications and classroom alterations.[124] This is because funding practices, which appropriate less financial assistance for students with disabilities served in home districts, enable school districts to obtain the maximum amount of funding possible from State sources by assigning students to the more restrictive placement settings.[125] As a result, many schools that have the resources and capability to accommodate students with disabilities in the regular classroom may opt for alternative settings to receive increased State funding.[126] There also is concern that resource-based formulas can encourage local school districts to identify students to "fill slots" in a specific classroom and discourage placement in a regular classroom.[127] State funding formulas that create such incentives can potentially hinder compliance with IDEA and section 504 requirements to educate students with disabilities in the regular class to the greatest extent possible.[128]

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[119] *See* Parrish, *Special Education Finance*, pp. 8–9; Goldman, "Promises Made," p. 265; Gartner and Lipsky, "Beyond Special Education," pp. 374–77, 391 (citing Lisa Walker, "Procedural Rights in the Wrong System: Special Education is not Enough," in Alan Gartner and Tom Joe, eds., *Images of the Disabled / Disabling Images* (New York: Praeger, 1987), p. 110 and Study by Lynn Weikart, Chief Administrator, Office of Finance and Management, Division of Special Education (1981–1983); Joseph Shapiro et al., "Separate and Unequal," *U.S. News and World Report*, vol. 115, no. 23 (Dec. 13, 1993), pp. 46–47 (noting that in nearly two-thirds of the 50 States, reimbursement formulas for special education programs had an effect in determining the number and type of such programs funded); NASBE, *Winners All*, pp. 30–31; Raymond Hernandez, "Critics Attack Pataki Formula for Helping Disabled Students," *New York Times* (Mar. 4, 1996), p. B1 (hereafter cited as Hernandez, "Critics Attack Pataki"). Some States defend their use of a weighted-pupil formula (especially if the weighting scheme was based on placement setting rather than disability category) because it fosters a link between State special education aid and the variations in actual program costs faced by school districts. DOEd, *1995 IDEA Report*, p. 119; Parrish, *Special Education Finance*, p. 8.

[120] *See* Gartner and Lipsky, "Beyond Special Education," (citing Study by Lynn Weikart, Chief Administrator, Office of Finance and Management, Division of Special Education (1981–1983). Gartner and Lipsky note that the Weikart study found that the net cost to the school system was greater when the student was placed in a more rather than less restrictive environment. *See* ibid., p. 391, n. 30. *But see* Hernandez, "Critics Attack Pataki," p. B1. The Governor of New York, George E. Pataki, has proposed modifying the way New York funds special education. Governor Pataki proposes eliminating the current funding formula which calculates State aid on the basis of a student's disability and which provides more funding for a student with severe disabilities than a student with moderate or mild disabilities. The Governor plans to replace the formula with a single reimbursement rate covering all students with disabilities, regardless of disability type. This change would eliminate incentives for school districts to refer students arbitrarily to expensive, segregated placements. Although the Governor's plan would set aside additional funds for students with disabilities requiring expensive, extensive care, critics of the plan say that this new funding formula would fail to provide for many students with severe disabilities. Ibid.

[121] Shapiro et al., "Separate and Unequal," p. 47.

[122] Parrish, *Special Education Finance*, p. 8; DOEd, *1995 IDEA Report*, p. 119 (presenting the opinion of the Center for Special Education Finance). *See also* Magnetti, "Some Potential Incentives," p. 310.

[123] *See* NASBE, *Winners All*, pp. 30–31; National Council on Disability, *Improving Implementation of the Individuals with Disabilities Education Act*, pp. 10, 169 ("available funds are tied to segregating programs and practices."); Gartner and Lipsky, "Beyond Special Education, pp. 374–75; Goldman, "Promises Made," p. 264; U.S. Department of Education, *Individuals with Disabilities Education Act Amendments of 1995*, pp. 24–26 (hereafter cited as DOEd, *1995 IDEA Amendments*); DOEd, *1995 IDEA Report*, p. 119 (presenting the opinion of the Center for Special Education Finance (CSEF)) (As of November 1996, CSEF had not published the 1994–1995 survey.); National Council on Disability, *Improving the Implementation of the Individuals with Disabilities Act: Making Schools Work for All of America's Children, Supplement*, p. 351 (citing T. B. Parrish, *State Funding Provisions and Least Restrictive Environment: Implications for Federal Policy* (Palo Alto, CA: Center for Special Education Finance, Fall 1993)); T.B. Parrish, *Removing Incentives for Residential Placements* (Palo Alto, CA: Center for Special Education Finance, October 1994); Bristo testimony (citing National Council on Disability, *Inclusionary Education for Students with Disabilities—Keeping the Promise*, 1994); Magnetti, "Some Potential Incentives," p. 312.

Although State funding formulas can create such incentives, other factors also may affect placement decisions. *See* Fran E. O'Reilly, *State Special Education Funding Formulas and the Use of Separate Placements for Students with Disabilities:*

Because of the concerns over these State funding practices, some disability rights advocacy groups and education organizations have suggested and/or undertaken reforms. For example, the National Association of State Boards of Education (NASBE) has favored adopting a variation of the flat grant funding method.[129] According to

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Exploring Linkages (Palo Alto, CA: Center for Special Education Finance, December 1995), p. 21 (concluding that State geographic features such as region and population density and a State's history and tradition in providing educational services, accepting the use of private schools, and developing special education services may also affect the extent to which a State use separate placements); Magnetti, "Some Potential Incentives," p. 320 (noting that the level of special education funding, the history of special education in the jurisdiction, the relationship of education agencies to other government agencies, the interaction of special education programs and such activities as mental health programs and child welfare services, and the activities of special interests—also contribute to the fiscal incentives under which school districts operate."); NASBE, *Winners All*, p. 31 (noting that the time during which a State provides special education funding to school districts also creates disincentives for regular education placement).

[124] *See* Gartner and Lipsky, "Beyond Special Education," p. 391 (citing Lisa Walker, "Procedural Rights in the Wrong System: Special Education is not Enough," in Alan Gartner and Tom Joe, eds., *Images of the Disabled / Disabling Images* (New York: Praeger, 1987), p. 110); Shapiro et al., "Separate and Unequal," p. 47.

[125] *See* NASBE, *Winners All*, p. 31.

[126] *See* chap. 3, p. 8.

[127] Goldman, "Promises Made," p. 264. *See also* Magnetti, "Some Potential Incentives," p. 311. According to Magnetti, resource-based formulas "may encourage maximization of class size as a means of reducing per pupil costs. . . If resource-based formulas are based on the unit or teacher of a special class, placement in less restrictive environments [such as the regular classroom] is generally discouraged. . ." However, she does note that "if resource reimbursements are defined to include alternative placement units and support personnel, then consideration of a variety of placements is reinforced." Ibid., p. 311. *See also* chap. 2, pp. 49–53, for a related discussion on the issue of overidentification resulting from IDEA funding formulas.

[128] Goldman, "Promises Made," pp. 253, 263; NASBE, *Winners All*, pp. 30–31; Thomas Parrish, *Special Education Finance*, p. 9; Shapiro et al., "Separate and Unequal," p. 46; DOEd, *1995 IDEA Report*, p. 116; Gartner and Lipsky, "Beyond Special Education," pp. 374–77, 391 (citing Lisa Walker, "Procedural Rights in the Wrong System: Special Education is not Enough," in Alan Gartner and Tom Joe, eds., *Images of the Disabled / Disabling Images* (New York: Praeger, 1987), p. 110); Hernandez, "Critics Attack Pataki," p. B1.

[129] NASBE, *Winners All*, pp. 30–32. A flat grants formula awards a fixed amount of grant money to school districts for each special education teacher, classroom unit, or student. *See* Goldman, "Promises Made," p. 264; and Parrish, *Special Education Finance*, p. 5. NASBE's proposed method is based on the following components:
(a) fixed amount of State aid per nondisabled K–12 student enrolled in a school district's general/regular education;
(b) estimated K–12 population of nondisabled students in a school district;
(c) fixed amount of State aid per K–12 student with disabilities enrolled in a school district's special education programs; and
(d) estimated K–12 population of students with disabilities in a school district.

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NASBE, with this formula's special education component, the local school district would receive a predetermined amount of aid based on an estimated enrollment for special education programs, rather than actual enrollment in specific special education placement settings.[130] The Center for Special Education Finance (CSEF)[131] has offered guidelines for States attempting to revise their special education funding formulas to remove incentives for restrictive placements. Under these guidelines, (1) States should remove fiscal incentives favoring restrictive and separate placements; (2) States must make decisions about the extent to which they wish to encourage private special education placements;[132] (3) States should develop funding systems in which funds follow students as they move to less restrictive placements, such as a move from a specialized school to a school in the student's neighborhood; (4) States could enhance fiscal support for district training;[133] and (5) States could fund and encourage the use of appropriate interventions for all students.[134]

Congress amended the IDEA to require States that have special education funding formulas appropriating different funding based on the type of placement setting, to demonstrate that their funding methods do not result in placements that violate the IDEA's least restrictive environment requirement. Under the IDEA Amendments of 1997, those States that cannot demonstrate this will be required to change their funding formula.[135] Congress intends to discourage funding formulas that create financial incentives to place

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In any district, the level of State aid would be calculated by (1) multiplying the estimated nondisabled student population in a school district by a fixed amount of State general/regular education aid per nondisabled student, (2) multiplying the estimated disabled student population in a school district by a fixed amount State special education aid per disabled student, and (3) adding the two products together. NASBE, *Winners All*, p. 32.

The fixed dollar amount for (c) is slightly higher—usually by a fixed percentage—than (a), since students with disabilities, on average, are more costly to educate than their nondisabled peers. NASBE, *Winners All*, p. 32. *See, e.g.*, Parrish, *Special Education Finance*, pp. 14–18; Stephen Chaikind et al., "What Do We Know About the Costs of Special Education? A Selected Review," *Journal of Special Education*, vol. 26, no. 4 (1993), pp. 344–69; Hamilton Lankford and James Wyckoff, "The Allocation of Resources to Special Education and Regular Instruction," in Helen Ladd, ed., *Holding Schools Accountable* (Washington, DC: Brookings Institution, 1996), pp. 228–34 (discussing the greater cost of educating students with disabilities, on average, compared to educating students without disabilities).

[130] NASBE, *Winners All*, pp. 32. *See also* DOEd, *1995 IDEA Report*, p. 116 (noting that census-based funding systems, those based on the overall count of students enrolled rather than the number of students specifically identified for special education services, severs the link between funding and local policies that determine how students with disabilities are identified and placed in special education programs.).

[131] CSEF is a research organization that is supported by DOEd's Office of Special Education Programs. The organization was established in October 1992, to address a comprehensive set of fiscal issues related to the delivery and support of special education services to children in the Nation. *See* Thomas Parrish, *Special Education Finance*.

[132] According to CSEF, some States may decide that private, as opposed to public placements are more restrictive under any circumstances and may wish to create fiscal disincentives for their use. Other States may decide that private placements are an integral component of the continuum of available placements for their special education students and that these types of placements should not be discouraged. Ibid., p. 20; DOEd, *1995 IDEA Report*, p. 120 (discussing the Parrish report).

[133] According to CSEF, States report the most success in fostering more inclusive service systems emphasize the need to support direct training for these types of program interventions. In addition, as fiscal disincentives favoring restrictive services are removed, district personnel must be provided with training and assistance in overcoming the practical difficulties associated with higher levels of inclusion that may result. Parrish, *Special Education Finance*, p. 21; DOEd, *1995 IDEA Report*, p. 120 (discussing the Parrish report).

[134] According to CSEF, students who are identified as eligible for special education because identification is the only way to provide them with remedial services have had their service options restricted. In addition, State funding systems that actively support alternative interventions for all students will be less likely to lead to program placements that are unnecessarily restrictive. Parrish, *Special Education Finance*, p. 21; DOEd, *1995 IDEA Report*, p. 115 (discussing the Parrish report).

students with disabilities in separate classrooms or schools or private institutions.[136]

Some States already have taken their own initiatives to reform special education funding practices. According to a 1994–1995 survey of State educational agency personnel conducted by the CSEF,[137] a major concern among some States is the need to minimize or eliminate financial incentives that lead to restrictive placements of students identified as having disabilities.[138] Many of the States with this concern are in the process of revising funding formulas based on pupil weights.[139] According to the survey data, 18 States have implemented some type of finance reform in the past 5 years, and 28 States are considering major changes in special education fiscal policy, of which 9 expect to implement some variation for their existing funding system or have a clear idea for a new one.[140] For example, States such as Massachusetts, Montana, Pennsylvania, and Vermont have revised their special education finance formulas, adopting a flat grant method based on the total student population instead of a special education student count. Such a change reportedly breaks the link between funding and local policies that determine how students with disabilities are identified and placed in programs.[141] Oregon has retained a weighted-pupil system but has strived to design a system that is "placement-neutral." It has adopted a single funding weight for all special education students such that the per pupil special education allocation is twice that of the per pupil general education allocation.[142]

Other Barriers to Regular Education Placement

Other barriers to regular education placement for students with disabilities include high costs often associated with inclusion and lack of understanding of disability-related student needs by some school administrators and teachers. In a study of the costs of providing inclusion in school districts in various States, analyses of resources such as instructional support staff, transportation, and facilities, indicated some of the fiscal barriers confronting schools in providing inclusion.[143] The same study, in reviewing school district expenditures needed to purchase adaptive materials, reported that equipment costs varied in range from $1,500 per school for duplicate adaptive equipment and materials to $30,000 per school to purchase computers and adaptive equipment.

Another potential barrier to regular education placement arises from attitudes and perceptions of some school administrators and teachers. According to some education researchers and scholars, if schools are going to provide the resources and teaching to assist a disabled student in the

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135 Pub. L. No. 105–17, § 651(a)(6)(I) (1997).

[136] *See* H.R. 5, 105th Cong., 1st sess. § 1 (1997) (amends § 612(a)(4)(A) to read, "The State's method of distributing funds shall not result in placements that violate the requirements of subparagraph (A) [the least restrictive environment requirement]"). ***See also Education Daily***, June 24, 1996, p. 5.

[137] The survey was conducted to examine States' current methods of financing school districts' special education programs, incentives for districts to identify students as needing special education programs, and State efforts to reform their special education finance systems. DOEd, *1995 IDEA Report*, p. 115 (reporting on the survey). As of December 1996, CSEF has not published the 1994–1995 survey on State special education funding systems.

[138] Ibid., p. 116.

[139] Ibid.

[140] Ibid., p. 115.

[141] Ibid., p. 116.

[142] Ibid., p. 119. Interviews with a broad range of interested persons in Oregon in 1994 indicated a general consensus that the placement-neutral objective was largely being met by the new formula.

[143] Margaret J. McLaughlin and Sandra Hopfengardner Warren, "The Costs of Inclusion: Reallocating Financial and Human Resources to Include Students with Disabilities," *The School Administrator* (November 1994), pp. 8–19, p. 11.

regular educational environment, school administrators and teachers must be supportive of a primary goal of regular education placement.[144] They must have some training and knowledge of the needs of students with disabilities. In addition, school principals must understand the challenges confronted by regular and special education teachers in providing educational instruction and other support to students with disabilities in regular classes. One factor apparently contributing to difficulties in successful placement of students with disabilities in the regular educational environment is limited support and/or understanding from school administrators, teachers, and other school staff for this goal.

There is concern that some school administrators do not fully support or understand the magnitude of time, resources, and staff necessary to meet disabled students' needs in regular classes. According to some education scholars, "The principal plays one of the most important roles in an inclusive school. Researchers have found repeatedly that inclusion programs are not successful if the principal does not take an active and positive role in the process."[145] The school principal often is the key to scheduling planning time and coordination among teachers, to evaluating overall program effectiveness, and to facilitating communication among teachers, parents, students, and the community. Planning time is essential for special education and regular education teachers and aides to permit them to develop their individual plans to instruct students with disabilities in regular classes. In addition, planning time is necessary for teachers and aides to coordinate their time devoted to the students and to clarify goals and responsibilities. Some teachers, however, have reported that they do not have the time necessary to plan effectively for the instruction of disabled and nondisabled students in the same setting.[146] There are also reports of other factors affecting regular education placement of students with disabilities: (1) lack of a comprehensive plan in schools to evaluate the effectiveness of programs and services for students with learning disabilities, especially those served in regular classrooms; and (2) insufficient communication concerning students with learning disabilities among administrators, teachers, specialists, parents, and students to facilitate the development and implementation of effective programs.[147]

In addition to the concerns raised about school administrators, there also is concern about regular education teachers and their support for and understanding of the regular educational placement objective. Research shows that many regular education teachers are unwilling or unsupportive of the placement of students with disabilities into regular education classes.[148] For example, in a survey of the American Federation of Teachers

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[144] According to the National Joint Committee on Learning Disabilities, "[t]o ensure effective mainstreaming of students with learning disabilities, the building principal must set the tone for a positive and accepting learning environment for all children." National Joint Committee on Learning Disabilities, "Providing Appropriate Education," p. 331. *See also* Good et al., "Effects of Classroom Performance Data," p. 152. Some of the conditions supporting inclusive school practices include (1) leadership demonstrated by individuals within school buildings, districts, and at the State level that helps educators build a vision of inclusive services and supports actions to achieve realization of that vision; and (2) ongoing and vigilant support and training of the front-line general and special education teachers as the general education curriculum is adapted to ensure IEPs are implemented for students with disabilities. DOEd, *1995 IDEA Report*, pp. 18–19 (citing Janney, Snell, Beers, and Raynes, 1995; Salisbury, 1991; and Fuchs, Fuchs, Hamlett, Phillips, and Karns, 1995).

[145] Van Dyke et al., "How to Build an Inclusive School," p. 477.

[146] In September 1993, two teachers in the Kansas City, MO, school system volunteered to have students with disabilities placed in their classes. They stated that with the assignment of students with disabilities to their classes, "there was no planning time, and it was still very difficult to meet all of the students' needs." Phelps, *Inclusion and Integration*, p. 10. In a study of a school community in a midwest Colorado school district, 90 percent of the school teachers and principals surveyed said that they were not given enough time to plan together cooperatively. Ibid., p. 11 (citing Roach, 1991 and Welburn, 1991). *See also* National Joint Committee on Learning Disabilities, "Providing Appropriate Education," p. 331.

[147] National Joint Committee on Learning Disabilities, "Providing Appropriate Education," p. 331.

[148] *See* Good et al., "Effects of Classroom Performance Data," p. 139 ("general education teachers express negative attitudes

(AFT) conducted in 1992, 70 percent said that inclusion has become a problem.[149] These AFT members' position is that an objective of regular education placement threatens job security for special education teachers.[150] In addition, regular educational placement is seen as creating "too much work" for regular education teachers who lack the specialized training or time necessary to meet the disabled student's needs. If a regular education teacher strives to provide the one-on-one assistance necessary for some students with disabilities, he or she has less time to focus on the other students in the class.

Among parents who testified at a field hearing on the IDEA sponsored by the National Council on Disabilities, one parent said that her child was ignored by the regular classroom teachers who blamed the student for requiring special help, and pressured them (the parents) to remove the child from the integrated classroom.[151] Another parent stated that in her city, the teachers' union wants a "moratorium" on inclusion and "veto power" over the acceptance of students with disabilities into classrooms.[152] A few persons also testified that although some teachers initially support integration, some want to revert back to segregated programs as soon as any problems arise.[153] Also, one parent testified that the attitudes towards inclusion varies from teacher to teacher. Her child's experience with a teacher in one grade was positive, while in another grade, the teacher was inflexible and unwilling to modify the curriculum of produce incentives for good behavior.[154]

Other witnesses testified about the negative attitudes of professionals, including teachers, towards inclusion. When these negative attitudes persist, in some cases, the burden is on the students and their families to "prove" that they are "ready" for inclusion.[155]

Of the approximately 50 people who discussed professionals' attitudes about inclusion, several testified that "many teachers are unhappy with inclusion," and are not always receptive to having children with disabilities in their classroom.[156]

At a congressional hearing on the reauthorization of the IDEA, the president of the National School Boards Association testified that "full inclusion" is not appropriate for some students with disabilities. He said that for students who require extensive individualized assistance or who do not

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toward reintegrating students with handicaps. . . To date, little empirical evidence has been provided to suggest general education teachers are willing to reintegrate special education students. A number of studies have been conducted on general education teachers' reintegration attitudes suggesting the opposite."). A study of a school community in a midwest Colorado school district examined teacher attitudes to inclusion. Fifty-three percent of teachers responding to the study's survey said that inclusion of special education children created too much work. Twenty-eight percent said that inclusion of the program would be detrimental to the education of other students; 60 percent of the staff said that they wanted the special needs students to be included; 49 percent stated that inclusion was not the best way to go. Seventy-three percent did agree that the other children would accept the students with special needs. Seventy-seven percent concluded that inclusion had created tension within their school building; 95 percent of principals agreed. Phelps, *Inclusion and Integration*, p. 11 (citing Roach, 1991 and Welburn, 1991).

[149] Phelps, *Inclusion and Integration*, p. 13.

[150] "Albert Shanker, a prominent teachers union leader, suggested that special education teachers would be out of work." Phelps, *Inclusion and Integration*, p. 13. Supporters of inclusion argue that special educators remain crucial to inclusion of students with disabilities in regular classes. Van Dyke, Stallings, and Colley, "How to Build an Inclusive School", p. 476.

[151] Ibid.

[152] Ibid.

[153] Ibid.

[154] Ibid., p. 88.

[155] Ibid., p. 86.

[156] *Improving the Implementation of the Individuals with Disabilities Education Act: Making Schools Work for All of America's Children* (Washington, D.C.: National Council on Disability, May 8, 1995), p. 85.

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have "sufficiently well developed social skills", instruction in the general curriculum may not be beneficial. He added that "many teachers and disability advocates" share this feeling that "full inclusion is not always an educationally sound strategy."[157]

A 1994 report by the National Council on Disability found school personnel in some districts helped to create barriers to the inclusion of children with disabilities in regular education classrooms.[158] The report indicates that personnel in some school districts, including educators, have policies or implement procedures that require student with disabilities to "prove" that they belong in regular education classrooms. One witness in the study said that a teacher testified that "she was against integrating her severely disabled student," because of his disability.[159]

Although many regular education teachers are receptive to instructing students with physical disabilities in their regular classes, most are less willing to teach students with disabilities that affect their academic abilities or behavior.[160] Studies on teacher attitudes identified two important factors influencing regular education teachers' positions on instructing students with disabilities: (1) teachers' confidence in their ability to teach special education students; and (2) teachers' prior coursework in special education.[161] Other factors that have influenced teachers' attitudes on instructing students with disabilities in the regular class include the general education teacher's success with special education students and the availability of support services.[162]

The Least Restrictive Environment Requirement: OCR's Enforcement Efforts

The Office for Civil Rights' (OCR) approach to placement issues is based on the least restrictive environment (LRE) requirement contained in the section 504 regulations. There are several provisions in the regulations that constitute the LRE requirement relating to the level of interaction among disabled and nondisabled students and the settings in which students with disabilities are placed. The first provision requires recipient elementary and secondary schools to educate each qualified student with a disability in a setting with nondisabled students to the maximum extent appropriate to the disabled student's needs.[163]

The second provision requires that recipient schools seek to place each student with a disability in the regular educational environment operated by those schools.[164] This requirement is intended to ensure that students with disabilities have access to the core academic curriculum, and thus have equal educational opportunities and exposure to high academic standards. If a school district places a student with a disability in a program where access to the core academic curriculum is not likely, it must demonstrate that the separate program is necessary to educate the student.[165] The school district must show that the student cannot achieve satisfactorily in the regular environment even when provided with aids and services to supplement his or her education in that environment.[166] In the appendix to the regulations, there is some guidance on the criteria that a recipient school must meet to show that a student with a disability cannot achieve satisfactorily in the regular environment. The appendix specifies that a student with a disability "may be removed from the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting."[167]

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[157] Testimony of Boyd W. Boehlje, President, National School Boards Association, and member of the Pella, Iowa Board of Education, *Hearing on the Reauthorization of the Individuals with Disabilities Education Act (IDEA)*, Hearing Before the Subcommittee on Select Education and Civil Rights of the Committee on Education and Labor, U.S. House of Representatives, July 19, 1994, p. 47.

[158] *Inclusionary Education for Students with Disabilities: Keeping the Promise* (Washington, D.C.: National Council on Disability, Dec. 30, 1994), pp. 59–66.

[159] Ibid., p. 59.

[160] "[T]eachers were most agreeable to teaching students" with physical disabilities, "disabilities [that] did not inhibit their learning or the learning of their classmates." They were willing to make physical accommodations but would not favor academic or behavior accommodations. Phelps, *Inclusion and Integration*, p. 12. At least one study indicates that teachers' attitudes toward regular education placement are influenced more by disabled students' academic performance than their social behavior. *See* Good et al., "Effects of Classroom Performance Data", p. 151.

[161] Good et al., "Effects of Classroom Performance Data," p. 139 (citing T.M. Stephens and B.J. Braun, "Measures of regular classroom teachers' attitudes toward handicapped children," *Exceptional Children*, vol. 56 (1980), pp. 292–94 ("However, 81% of the variance in teachers' willingness was unaccounted in the study.")).

[162] Ibid., p. 140 (citing B. Lariveen and L. Cook, "Mainstreaming: A Study of the Variables Affecting Teacher Attitude," *The Journal of Special Education*, vol. 13 (1979), pp. 315–24 (Much of the variance, however, was unaccounted for)).

[163] 34 C.F.R. § 104.34(a) (1996).

The third provision requires that, in providing or arranging for the provision of nonacademic and extracurricular services and activities,[168] a school must ensure that a student with a disability participates with nondisabled students in such services and activities to the maximum extent appropriate to the needs of that disabled student.[169] The appendix to the regulation specifies that this requirement "is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day."[170]

A fourth provision states that when a recipient places a person in a setting other than the regular educational environment, it must take into account the proximity of the alternate setting to the person's home.[171] These four provisions contain several important but imprecise terms such as "to the maximum extent possible" and "achieved satisfactorily," which OCR has not defined in policy, but which, in practice, has been translated into compliance standards.[172]

To date OCR has not issued any formal policy or investigative guidance on the analytical framework it employs in determining compliance with

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[164] *Id.*

[165] Norma V. Cantú, Assistant Secretary for Civil Rights, Office for Civil Rights (OCR), U.S. Department of Education (DOEd), memorandum to All Staff, "Minority Students and Special Education," July 6, 1995, Policy Codification Document No. 00291, p. 12 (hereafter cited as OCR, "Minority Students and Special Education" Policy).

[166] 34 C.F.R. § 104.34(a) (1996).

[167] 34 C.F.R. pt. 104, app. A, subpt. D, no. 24 (1996).

[168] These services and activities include meals, recess periods, counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients. 34 C.F.R. §§ 104.34(b) and 104.37(a)(2) (1996).

[169] 34 C.F.R. § 104.34(b) (1996).

[170] 34 C.F.R. pt. 104, app. A, subpt. D, no. 24 (1996).

[171] 34 C.F.R. § 104.34(a) (1996).

[172] In practice, OCR has based compliance with this provision on the following approach. It has considered whether the decisionmaking process of the school district in determining the placement of the student and the level of interaction with nondisabled students is based on the individual needs of the student. In addition, OCR has required the school districts' justification for the removal of the student from the regular educational environment to be based on the student's educational needs. *See* discussion below, p. 189–91.

the LRE requirement.[173] Most of its policy documents addressing LRE have been policy letters in response to specific inquiries or memoranda clarifying OCR policy for case-specific issues.[174] OCR's analytical approach on the least restrictive environment requirement is based on the presumption that students with disabilities belong in the regular education environment. A school district cannot remove students with disabilities from the regular setting unless the child cannot be educated satisfactorily with the assistance of supplemental aids and services.[175] Therefore, OCR considers whether the educational professionals have given some justification for the removal and whether there is evidence to support their reasons for removing the student from the regular education setting. Once the school district provides evidence of an educational justification, OCR does not question or second guess the justification as long as it is educationally sound.[176]

OCR, however, does not have a policy document detailing the precise standards for an educational justification for a more restrictive placement.[177] At least one regional office, the Seattle office, considers input from educational experts and standards in IDEA case law. According to a staff attorney with that office, OCR determines that a particular methodology is educationally sound based on its consultations or other work with education experts. These experts inform OCR of the various accepted educational methodologies for instructing students with particular disabilities. As long as an educational methodology is one generally accepted by the professional community, OCR considers the program educationally sound.[178] A chief civil rights attorney in that office also noted that there is an extensive amount of IDEA case law and other resource materials that his regional office looks to when it handles LRE cases.[179] This approach is not documented in OCR policy or other documents; therefore, it is unclear whether other regional offices apply the same approach.

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[173] OCR's *Section 504 and Americans with Disabilities Act (ADA) Title II Manual* notes some historical documents that may provide investigative guidance. These include (1) a model investigative plan used by OCR, Region V, to conduct compliance reviews on the LRE issue; (2) a memorandum, dated Aug. 20, 1981, entitled "An Analysis of Section 504's and EHA's Requirement Providing Special Education to Handicapped Students in the Least Restrictive Environment," by Sue Gamm, Assistant Regional Civil Rights Attorney, Region V; and (3) a memorandum dated Sept. 23, 1987, entitled "Supplemental Memorandum—Placement of Handicapped Students in the Least Restrictive Environment," by Ronna Goldberg, Assistant Regional Attorney, Region V. OCR, "Section 546—Least Restrictive Environment (LRE) Requirement." The Commission was not provided with these materials in response to its request for information from DOEd/OCR headquarters office.

[174] *See* Harry M. Singleton, Assistant Secretary for Civil Rights, DOEd, memorandum to Regional Civil Rights Directors, Regions I–X, "Collective Bargaining Agreement Provisions Restricting Placement of Handicapped Children in Regular Classes," June 12, 1985, *reproduced in* OCR's electronic library at HQ951045.PDC (hereafter cited as Singleton, "Collective Bargaining" policy memorandum); William L. Smith, Acting Assistant Secretary for Civil Rights, and Robert R. Davila, Assistant Secretary for the Office of Special Education and Rehabilitative Services, DOEd, letter to David S. Tatel, Esq., and Maree Sneed, Esq., Hogan & Hartson, Feb. 9, 1990, *reproduced in* OCR's electronic library at HQ951224.PDC (discussing interdistrict "choice" programs); Richard D. Komer, Deputy Assistant Secretary, OCR, DOEd, memorandum to OCR Senior Staff, "Notice of Policy Guidance on Deaf Students Educational Services," Dec. 30, 1992, *reproduced in* OCR's electronic library at HQ951266.PDC; Jeanette J. Lim, Director, Policy Enforcement and Program Service, OCR, and Thomas Hehir, Director, Office of Special Education Programs, Office of Special Education and Rehabilitative Services, DOEd, letter to Michele Williams, Advocates for Children's Education, Mar. 14, 1994, *reproduced in* OCR's electronic library at HQ951277.PDC (hereafter cited as Lim and Hehir response to Williams inquiry) (discussing the education of children with attention deficit disorder or attention deficit hyperactivity disorder).

[175] 34 C.F.R. § 104.34(a) (1996).

[176] *See* Carolyn Madsen, Staff Attorney, OCR, Region X, DOEd, telephone interview, June 10, 1996, pp. 6–8 (hereafter cited as Madsen interview).

[177] *See* John Binjes, Chief Civil Rights Attorney, OCR, Region X, DOEd, telephone interview, June 10, 1996, p. 4 (hereafter cited as Binjes interview).

[178] *See* Madsen interview, p. 8.

[179] *See* Binjes interview, p. 4.

In practice, when OCR conducts a complaint investigation or compliance review on the LRE issue, it looks at the student's file for documentation on how the placement determination was made.[180] It also interviews parents or guardians, parents' advocates, those individuals participating in IEP meetings, and other school district staff to determine what the school district considered in making its placement decision.[181] OCR considers a number of issues in determining whether a student with a disability has been educated in the least restrictive environment appropriate to his or her needs. It considers whether the placement team conducted a full evaluation that complied with the requirements of the section 504 regulation. It considers whether the evaluation shows that the student could not benefit from placement in a less restrictive setting.[182] The section 504 regulations require that schools justify any removal from the regular program.[183] Therefore, OCR investigators consider whether there is justification to show that placement in a more restrictive setting or separation from students without disabilities is necessary.[184] They consider whether the evaluation and placement decision

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[180] *See, e.g.*, Kenneth A. Mines, Regional Director, OCR, DOEd, letter to Allen Ormson, District Administrator, Luck School District, Luck, WI, re: Complaint No. 05–93–1055, July 9, 1993, *reprinted in* 20 IDELR 553, 554 (hereafter cited as OCR Complaint re: Luck School District, 20 IDELR 553); J. Michael Burns, Deputy Regional Director, OCR, DOEd, letter to Juan Lopez, Superintendent, Vocational Technical School System, Middletown, Conn., re: Complaint No. 01–83–1010, Sept. 30, 1994, *reprinted in* 21 IDELR 1073, 1074–75 (hereafter cited as OCR Complaint No. 01–83–1010, 21 IDELR 1073); Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to Paul L. Vance, Superintendent, Montgomery County Public Schools, Rockville, MD, re: Complaint No. 03–91–1055, July 15, 1992, *reprinted in* 19 IDELR 43 (hereafter cited as OCR Complaint No. 03–91–1055, 19 IDELR 43).

[181] *See, e.g.*, Kenneth A. Mines, Regional Director, OCR, Cleveland Office, DOEd, letter to Russell L. Sammons, Superintendent, Northwest Local School District, Cincinnati, OH, June 4, 1993, *reprinted in* 20 IDELR 544, 545 (hereafter cited as OCR Complaint re: Northwest Local, 20 IDELR 544); OCR Complaint re: Luck School District, 20 IDELR 553, 554–55; Brenda L. Wolff, Acting Director, Compliance Division I, OCR, Region III, DOEd, letter to James D. Horn, Superintendent, Somerset County Public Schools, Princess Anne, MD, re: Complaint No. 03–94–1104, June 30, 1994, *reprinted in* 21 IDELR 940 (hereafter cited as OCR Complaint No. 03–94–1104, 21 IDELR 940); OCR Complaint No. 03–91–1055, 19 IDELR 43.

[182] Mai Cavalli, Regional Issue Coordinator on Minorities in Special Education, OCR, Region IV, DOEd, interview in Atlanta, GA, June 4, 1996, p. 4 (hereafter cited as Cavalli interview).

[183] *See* 34 C.F.R. § 104.34(a) (1996). *See also* Jean Peelen, Enforcement Director, DC Metro Office, OCR, DOEd, interview in Washington, DC, May 28, 1996, p. 2 (hereafter cited as Peelen interview) (According to Ms. Peelen, "It is OCR's position that the law assumes that students belong in regular classes so the focus necessarily should be on justifying why students should be removed from the regular classes and not why they should be kept in those classes."); Joe Mahoney, Equal Opportunity Specialist, and Eva Das, Staff Attorney, OCR, Region III, DOEd, telephone interview, June 18, 1996, p. 4 (hereafter cited as Mahoney and Das interview).

[184] *See, e.g.*, Linda A. McGovern, Acting Regional Director, OCR, Region V, DOEd, letter to Larry Engel, Superintendent, Saginaw Intermediate School District, Saginaw, MI, re: Complaint No. 15–92–1063, July 2, 1992, *reprinted in* 19 IDELR 37, 38 (hereafter cited as OCR Complaint No. 15–92–1063, 19 IDELR 37) ("OCR found that the IEPs for the eight emotionally impaired students placed at the Millet Center reflected both the extent that these students would participate in academic activities with nonhandicapped students and the reasons for placing the students in their respective full- or part-time special education placements at the Millet Center."); OCR Complaint re: Northwest Local, 20 IDELR 544; Jesse L. High, Regional Civil Rights Director, OCR, Region IV, DOEd, letter to John R. Stevenson, Superintendent, Richland County School District #1, Columbia, SC, re: Complaint No. 04–89–1276, Sept. 25, 1989, *reprinted in* 16 EHLR 53, 54–55 (OCR determined that the district did not demonstrate that students with emotional disabilities could not be educated in the regular educational environment with the use of supplementary aids and services. OCR found that the placement report and LRE forms showed that placement in a self-contained class was recommended for all of the students with emotional disabilities. Placement in the separate school was specifically indicated only for half of these students. The files did not document the reason for placement of all of the students in the separate school.); Jesse L. High, Regional Director, OCR, Region VII, DOEd, letter to Samuel A. Scarnato, Superintendent, Special School District of St. Louis County, St. Louis, MO, re: Complaint No. 07851070, Feb. 14, 1986, *reprinted in* 352 EHLR 157, 159–60.

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covered both the placement setting and interaction with nondisabled students. When OCR investigators review the decisionmaking regarding interaction with nondisabled students, they determine whether the group making the placement decision considered the possibility of the student participating in any and all regular programs, including academic and nonacademic classes, extracurricular activities and services, lunch, and recess.[185] If the school district can show that it considered the student's needs with respect to participating with nondisabled students in these programs, OCR will not second guess the school's placement decision.[186]

OCR will find compliance problems if it appears that the school did not base a placement decision on the student's individual needs. OCR has found a number of factors to be indicative of this, such as the failure to conduct individual evaluations on each student prior to placement.[187] For example, in one case, OCR identified problems in reviewing a sample of 21 files of cognitively disabled students enrolled at a separate, special school for students with disabilities. In those files, the school district did not provide individual justifications for the removal of each student from the regular educational environment. The files did not document that each student currently enrolled at the school could not be educated satisfactorily in the regular educational environment with the use of supplementary aids and services. Instead, the justifications for removal were generalized statements similar for all the students.[188] OCR also has noted that "[w]hen considering placement in a segregated educational facility, the [placement] decision may not be based upon such factors as the category of the handicapping condition, availability of staff or services, administrative convenience, parental preference or any perceived attitude toward or treatment of handicapped students by nonhandicapped students or regular education staff."[189] In addition, "[h]andicapped students also may not be placed at a segregated facility because the curriculum and services considered appropriate for their needs are available only at such a facility."[190]

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[185] *See, e.g.*, OCR Complaint No. 01–93–1010, 21 IDELR 1073, 1075 (The district's files indicated that students with learning disabilities/social-emotional maladjustment received a range of services pursuant to their IEPS, some in the special education area and some in the mainstream area. OCR also established that the LD/SEM students were mainstreamed for both academic and nonacademic subjects depending on their individual programs.); OCR Complaint No. 03–94–1104, 21 IDELR 940, 940–41; OCR Complaint No. 15–92–1063, 19 IDELR 37, 38 (Although the students' IEPs did not reflect the extent to which the students were to participate in nonacademic and extracurricular activities, interviews with parents/guardians, district personnel and ISD personnel confirmed that such participation is discussed at IEP meetings); Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to Roger S. Hertz, Executive Director, Berks County Intermediate Unit #14, Reading, PA, re: Complaint No. 03–90–1078, July 17, 1990, *reprinted in* 17 EHLR 5, 7 (OCR found that the district had not complied with section 504 due process procedures, due in part, to the fact that interviews with the psychologist, supervisor of special education, teachers, the IU's director and assistant director of special education and the program coordinator indicated that integration with nondisabled students in nonacademic and extracurricular activities are not considered at the MDT meeting or during the development of the IEP.).

[186] Mahoney and Das interview, p. 4.

[187] *See* Judy Stover, Equal Opportunity Specialist, and Catherine Edwards, Staff Attorney, OCR, Region III, DOEd, telephone interview, June 18, 1996, p. 5 ("For example, when you look at 100 files of students and the exact same sentence is written for each of those students it is obvious that individual evaluations were not conducted.").

[188] OCR Complaint re: Luck School District, 20 IDELR 553, 554.

[189] OCR Complaint No. 03–91–1055, 19 IDELR 43, 44. *See also* Paula Kuebler, Regional Director, OCR, Region II, DOEd, letter to Daniel Hickey, Superintendent, Peru Central School District, Peru, NY, re: Complaint No. 02–89–1092, Nov. 17, 1989, *reprinted in* 16 EHLR 514, 516 (OCR found that students with mental retardation and emotional disturbance were placed in a separate facility outside the school district because of administrative convenience due to space problems in the district. In addition, although the district returned the students to an environment with nondisabled students in the public school district, the decision was not based on the students' individual educational needs, but was only done as part of the plan to move the entire special education program/class back into the school district. OCR, therefore, found the school in violation of section 504 and the regulation at 34 C.F.R. § 104.34(a)).

OCR encourages schools to consider a variety of programs to facilitate placement of students with disabilities in the regular class. For example, with team teaching, the curriculum content in the regular education program does not change. Instead, the school includes special education students in the regular class with a special education teacher or a well-trained aide who understands special education techniques. This method exposes special education students to the same curriculum as nondisabled students.[191] OCR has anecdotal evidence that these methods are helping special and regular education students without compromising the quality of the curriculum.[192]

In the debate over special education (inclusion, REI, full inclusion, or the status quo), OCR has taken no position. According to the Enforcement Director for the DC Metro Office, OCR's emphasis is on the law—section 504 and its implementing regulations. Therefore, it does not characterize section 504 requirements or compliance in terms for or against "inclusion" or "full inclusion."[193] In its compliance reviews and policy, however, OCR has addressed the use of separate special education and regular education systems. OCR has never found the use of separate systems to provide education and related aids and services to students with disabilities as *per se* violations of section 504, although it has found violations based on *how* the education and services were provided.

For example, in a 1978 compliance review, OCR found that a "Special School District" did not meet the requirements for section 504 compliance because the district segregated students with physical and mental disabilities from nondisabled students who attended the local school districts within St. Louis County. The Special School District did so by operating a separate system of education equipped with its own classrooms, teachers, and transportation system. OCR found that students with disabilities were automatically removed from classes in their local school districts and assigned to the Special School District, then assigned to separate buildings or classes solely on the basis of their disabilities. Further, neither the local school districts nor the Special School District adequately determined that the education of such students could not be achieved satisfactorily in regular classes with use of supplementary aids and services.[194]

In policy, OCR has addressed jurisdictional issues in those circumstances where separate systems of education exist. For example, one policy memorandum addressed the situation in Pennsylvania where public elementary and secondary education is composed of the Pennsylvania Department of Education, local school districts, and intermediate units. Primary responsibility for providing education to students with disabilities rests with the local school districts, although when a school district cannot provide an appropriate program effectively and efficiently, it must use the services of the intermediate unit. According to OCR, the intermediate unit as a recipient of IDEA funds will be held responsible under section 504 for providing a free appropriate public education to students with disabilities. However, the Pennsylvania Department of Education will remain responsible under section 504 to the extent that it directly provides special education services or when a policy prevents an intermediate unit from fulfilling section 504 obligations.[195] A subsequent policy memorandum provided guidance on the special school districts (SSDs) in Missouri. SSDs are separate and independent of the local school districts. Local school districts can elect to create SSDs to provide direct educational services to students with disabilities. SSDs receive IDEA funds. According to that memorandum, OCR may always assert jurisdiction over the SSDs. However, when the special education program of a local school district is funded by DOEd, both the local school district and the SSD are responsible for providing a free appropriate public education to students with disabilities.[196]

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[190] OCR Complaint No. 03–91–1055, 19 IDELR 43, 44.

[191] *See, e.g.*, Curriculum Adaptations: Customizing for Inclusion, *Inclusive Education Programs*, Bonus Report, July 1996.

[192] Mahoney and Das interview, pp. 5–6.

[193] According to Ms. Peelen, "it is difficult to discuss the terms 'inclusion' and 'full inclusion' because they are political terms that are not defined clearly by any one source." Peelen interview, p. 5.

[194] OCR, Region VII, DOEd, letter to Thomas E. Smith, Superintendent, Special School District of St. Louis County, Rock Hill, MO, re: Compliance Review, Mar. 27, 1978, *reprinted in* 311 EHLR 05, 05–06.

OCR has reviewed the practices of school districts in addressing behavior problems of students with disabilities. Its review has followed the basic analysis of LRE issues to ensure adherence to the evaluation and placement procedures of the section 504 regulations and that any justification for removal from the regular educational setting is based on the individual needs of the student.[197] Although placement of students with disabilities should be based on their needs, the appendix to the section 504 regulations recognizes one limited exception relating to behavior problems of students with disabilities. The appendix notes:

> Although under § 104.34, the needs of the handicapped person are determinative as to proper placement, it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by § 104.34.[198]

School districts often rely on disciplinary policies and procedures to deal with the disruptive or aggressive behavior of students. The Department of Education has noted that students with disabilities are not exempt from discipline under current law.[199] Disciplinary measures can involve study carrels, time-outs, or other restrictions consistent with the students IEP.[200] In some instances, these measures can include a change in a student's current placement, whether short- or long-term. Therefore, care must be taken to understand the cause of that student's disruptiveness or behavior, so as to avoid inappropriate removal of the student from his or her current placement setting. In addition, consideration of section 504 requirements is necessary prior to disciplining students with disabilities. For example, schools should be aware that the section 504 regulations require reevaluation of a student prior to a "significant change of placement,"[201] such as those changes in placement resulting from disciplinary action.

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[195] *See* Alicia Coro, Acting Assistant Secretary for Civil Rights, DOEd, memorandum to Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, "Jurisdiction over Pennsylvania Intermediate Units, Local School Districts and the Pennsylvania Department of Education," Jan. 13, 1987, pp. 1–6, *reproduced in* OCR's Policy Codification System No. 00032.

[196] Terence J. Pell, Acting Deputy Assistant Secretary for Policy, OCR, DOEd, memorandum to Thomas E. Esterly, Acting Regional Civil Rights Director, OCR, Region VII, "Your Request for Policy Guidance—Missouri Special School Districts," Oct. 26, 1987, pp. 1–5, *reproduced in* OCR's Policy Codification System No. 00031.

[197] For example, in one case, the complainant challenged the school district's practice of placing emotionally disabled students in specially designed rooms for disciplinary reasons. OCR found that this practice did not violate section 504 for a number of reasons. The school district had policies and procedures for controlling inappropriate behavior of students with disabilities; that it had implemented its established policies and procedures relative to 15 students with disabilities during the 1992–1993 school year; that students with disabilities were generally treated the same as students without disabilities in that they were referred to the assistant principal for disciplinary sanctions if their behavior was disruptive. In addition, there was data to show that placing students with disabilities who exhibit violent behavior or behavior that cannot be controlled through alternative disciplinary methods in separate time-out rooms has proven to be effective. In addition, OCR noted that this disciplinary method had permitted the schools to continue to serve these students with disabilities, although in self-contained programs, nonetheless in the regular educational setting. Furthermore, OCR reviewed the students' IEPs which showed that (1) the method of discipline had been discussed and approved by all parties involved in the development and implementation of the IEP, including parents and (2) it had been determined to be appropriate to meet the individual needs of each student with a disability. Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Ralph Archibald, Superintendent, Marion County School District, Ocala, FL, July 22, 1993, *reprinted in* 20 IDELR 634, 636.

[198] 34 C.F.R. pt. 104, app. A, subpt. D (1996).

[199] Judith E. Heumann, Assistant Secretary, Office of Special Education and Rehabilitative Services, and Thomas Hehir, Director, Office of Special Education Programs, U.S. Department of Education, Memorandum to Chief State School Officers, "Questions and Answers on Disciplining Students with Disabilities," Apr. 26, 1995, p. 1 (hereafter cited as 1995 Memorandum, "Questions and Answers on Disciplining Students with Disabilities.")

Although the section 504 regulations do not address discipline directly, OCR has assisted in bringing clarity to the issue of discipline under section 504. OCR has produced policy to clarify the requirements. A 1988 policy presents the general guidelines on discipline. The policy provides specific guidelines on and explanations of section 504 rights and responsibilities. Many aspects of this policy are very clear and practical. The policy specifies that when a school changes the placement of a student with disability for disciplinary reasons, the student and his or her parents or guardian are entitled to the procedural protections required by the section 504 regulations at § 104.36 (notice, an opportunity for examination of records, an impartial hearing, and a review procedure).[202] In addition, it offers guidelines on the duration of suspensions or expulsions so that schools know when certain section 504 obligations do or do not arise.[203] The policy clarifies that permanent exclusion (expulsion), exclusion for an indefinite period, or exclusion for more than 10 consecutive days constitutes a significant change in placement.[204] Under those circumstances, the school would have to reevaluate the student prior to taking disciplinary action. The policy notes that a series of suspensions that are each of 10 days or fewer in duration also can constitute a significant change of placement if it creates a pattern of exclusions. OCR will make this determination on a case-by-case basis considering factors such as the length of each suspension, the proximity of the suspensions to one another, and the total amount of time the student is excluded from the class or school.[205]

Both the 1988 policy and the 1995 memorandum note that the first step to the reevaluation of a student, whose change in placement is due to misconduct, is to determine whether the misconduct of the student was caused by the student's disability[206] or was a manifestation of the student's disability.[207] If it is determined that the misconduct was caused by the student's disability, the school must continue an evaluation of the student and determine an appropriate placement for the student following the requirements in the section 504 regulations. If it is determined that the misconduct was not caused by the student's disability, the school may exclude the student from school in the same manner as similarly situ-

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[200] Ibid., p. 7.

[201] 34 C.F.R. § 104.35(a) (1996).

[202] LeGree S. Daniels, Assistant Secretary for Civil Rights, DOEd, memorandum to OCR Senior Staff, "Long-term Suspension or Expulsion of Handicapped Students," Oct. 28, 1988, p. 2 (hereafter cited as Daniels, "Long-term Suspension" policy memorandum); *see also* 1995 Memorandum, "Questions and Answers on Disciplining Students with Disabilities," pp. 10–11.

[203] Daniels, "Long-term Suspension" policy memorandum; *see also*, 1995 Memorandum, "Questions and Answers on Disciplining Students with Disabilities," p. 7–10.

[204] Ibid., *see also* 1995 Memorandum, "Questions and Answers on Disciplining Students with Disabilities," p. 7.

[205] Daniels, "Long-term Suspension" policy memorandum.

[206] Ibid., p. 2.; 1995 Memorandum, "Questions and Answers on Disciplining Students with Disabilities," p. 9–10.

[207] 1995 Memorandum, "Questions and Answers on Disciplining Students with Disabilities," pp. 9–10; Daniels, "Long-term Suspension" policy memorandum; *see also* William L. Smith, Acting Assistant Secretary for Civil Rights, OCR, DOEd, memorandum to OCR Senior Staff regarding "Suspension of Handicapped Students—Deciding Whether Misbehavior is Caused By a Child's Handicapping Conditions," Nov. 13, 1989, *reprinted in* 16 EHLR 492 (hereafter cited as Smith, "Suspension of Handicapped Students" policy memorandum, 16 EHLR 492).

ated students without disabilities.[208] In a policy letter, OCR has clarified that these same criteria apply to in-house suspensions, those suspensions which exclude the student from the classroom with placement remaining in the school.[209]

A later 1989 OCR policy clarifies that conduct is a manifestation of the disability "if the [disability] significantly impairs the child's behavioral controls, but would not be [a manifestation of the disability] if it bears only an attenuated relationship to the child's [disability]."[210] Although this guidance provides some clarification, the phrases "significantly impairs" and "an attenuated relationship" are vague and lack context to actual educational practices. For example, they provide no reference to or examples of the professional educational and clinical standards used in schools.

OCR has not looked specifically at State funding policies and practices, such as State funding formulas, for their effect in undermining the LRE principles of section 504.[211] However, in policy guidance, OCR has addressed more generally the effects of policies such as local collective bargaining agreements on compliance with section 504. OCR has noted that "[c]ollective bargaining agreements between local educational agencies (LEAs) and teachers' unions may place conditions on the integration of special education students into regular classrooms."[212] For example, according to OCR policy, contract provisions that limit the number of students with disabilities in a regular classroom "do not appear on their face to be discriminatory."[213] However, any implementation of the provisions that has the effect of excluding a child with a disability for whom placement in the regular class has been determined to be appropriate would violate section 504 and the regulations. Therefore, a school district may not use the contract provisions to justify denying a child with a disability an education in the least restrictive environment appropriate to his or her needs. In addition, the policy notes that "any other burdens placed on [children with disabilities] or their parents because of the school district's attempts to comply with the collective bargaining agreement provisions may place the recipient in violation."[214] Although OCR has not addressed State funding formulas which create incentives for restrictive placement, it presumably would approach these policies in a similar fashion. OCR would find violations by school districts if they used the formulas to justify denying students with disabilities less restrictive placement settings without regard for the students' needs. At the State level, it is unclear whether OCR has or would encourage the States to adopt different funding formulas to ensure support for and compliance with the LRE principles of section 504.

In providing outreach and education, OCR has not produced a publication specifically devoted to the LRE requirement, although it has published a 1991 pamphlet entitled *Student Placement in Elementary and Secondary Schools & Section 504.* This pamphlet is helpful in providing a basic overview of placement requirements. It discusses several topics, including evaluation and placement procedures, educational setting, reevaluations, the individualized education program, procedural safeguards, and nonacademic services and activities. It presents the main principles of LRE and offers two limited examples of placements that are permissible. The pamphlet provides enough basic information to inform parents and students of their rights and schools of their obligations. For example, it clarifies that students with disabilities must be assigned to the regular courses or classes if the students' needs can be met there, and that decisions on their academic placements must be based on individual students' needs.[215] The pamphlet does not mention the requirement that when placing a student with a disability in a setting other than the regular educational environment, the proximity of the alternate setting to the student's home should be taken into account.[216]

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[208] Daniels, "Long-term Suspension" policy memorandum, p. 2.

[209] Jesse L. High, Regional Director, OCR, Region VII, DOEd, letter to Jane Rhys, Education Program Specialist, Kansas State Department of Education, Topeka, KS, Apr. 15, 1985, *reprinted in* 305 EHLR 26, 27.

[210] Smith, "Suspension of Handicapped Students" policy memorandum, 16 EHLR 492.

[211] This assessment is based on a review of the policy documents and case letters available to the Commission through its factfinding efforts.

[212] Singleton, "Collective Bargaining" policy memorandum, p. 2.

[213] Ibid., pp. 2–4. First, "classification on the basis of handicap is not in and of itself unlawful." Second, special conditions attached to the education of students with disabilities may be necessary, "in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met." Third, "to constitute unlawful discrimination, generally there must be some element of harmful effect or unfair treatment based on a person's or group's membership in a protected class." Ibid.

[214] Ibid., p. 4. The policy offers as an example that if a child with a disability must be moved to a more distant school in order to comply with the limitation in the collective bargaining agreement, the recipient may be in violation of the regulation requiring that proximity of an educational setting to the child's home must be taken into account. Ibid.

In addition to this pamphlet, OCR also has produced other publications addressing more contemporary placement issues. For example, in 1992, it published a pamphlet on *Placement of School Children with AIDS*, which discusses where children with acquired immune deficiency syndrome (AIDS) should be educated in terms of the LRE requirement.[217] It also produced a pamphlet on *Discipline of Students with Handicaps in Elementary and Secondary Schools*, which summarizes the responsibilities of school officials under section 504 and the rights of students and their parents in disciplinary situations that could result in expulsion or long-term suspension of a student. This pamphlet offers useful information in determining what types of disciplinary action would require a reevaluation of the student.[218]

In recent years, OCR has begun developing promising practices documents which promote equal educational opportunity in specific issue areas that have been implemented in school districts across the country.[219] None of these documents has addressed the issue of LRE. Nor have they discussed more specific contemporary issues, such as the placement of students with disabilities who have behavioral problems in the regular educational environment. Given the difficult decisions faced by some schools in ensuring compliance with the LRE requirement while also promoting school and classroom safety, order, and effective learning for all students, a promising practices document that addresses LRE and the

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[215] DOEd, OCR, *Student Placement in Elementary and Secondary Schools & Section 504* (1991), p. 3.

[216] *See* 34 C.F.R. § 104.34(a) (1996).

[217] DOEd, OCR, *Placement of School Children with AIDS* (1992), pp. 7–8.

[218] DOEd, OCR, *Discipline of Students with Handicaps in Elementary and Secondary Schools* (1992), pp. 4–6.

[219] For example, in March 1996, OCR released a promising practices document which describes a number of educational programs that may help schools ensure effective participation by limited-English-proficient students in their regular education programs. OCR, DOEd, *Promising Practices and Programs for Serving National Origin Limited English Proficient Students*, prepared by Lau Team, March 1996, submitted as part of DOEd/OCR/Philadelphia response to USCCR June 6, 1996 letter. In April 1996, it released a promising practices document on "Access for Women and Minorities to Mathematics and Science Programs and Gifted and Talented Education Programs." OCR, DOEd, *Promising Practices and Programs: Access for Women and Minorities to Mathematics and Science Programs and Gifted and Talented Education Programs*, April 1996, submitted as part of DOEd/OCR/Dallas response to USCCR June 6, 1996, letter. In addition, OCR has teams working on promising practices documents on the areas of ability grouping and overrepresentation of minorities in special education. *See* Barbara Shannon, Chief Regional Attorney, Atlanta Enforcement Office, OCR, DOEd, telephone interview, June 3, 1996, p. 8; Peelen interview, pp. 2, 6.

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contemporary issues associated with it would be useful.[220]

Developing Education Programs to Reflect Students' Different Needs and Abilities in Various Subjects

Reflecting Different Needs and Abilities

Educational and Policy Perspectives

A fundamental aspect of educating students is recognizing that each student is unique. Each student has varying needs and abilities which can differ for each subject or course pursued in school. For example, the student may excel in mathematics, yet perform at an average level in English or science. She or he may have a special talent in music or the visual arts. The same fact is true for students with disabilities. Their needs and abilities vary depending on their unique skills and talents and the way in which a disability affects them. A student's disability may affect only some aspects of his or her education, not necessarily all.

Because each student is unique, an important element for educating students with disabilities is developing education programs that reflect different needs and abilities. Educators have emphasized the importance of this element. For example, although there is disagreement about the curricular function of the individualized education program (IEP), it is agreed that the unique interests, needs, and capabilities of a student with a disability should be a determinant of that student's education program.[221] In addition, one study which surveyed teachers' beliefs about special education curricula reveals that over half of the teachers, 55 percent, believed that each student should have his or her own curriculum, adjusted for his or her needs and aptitudes.[222] Finally, among indicators that have been identified as useful to evaluating effective special education curriculum practices are (1) curricula with clear relationships among goals and objectives, instructional activities, and student learning levels; (2) curricula used in general education that include provisions for adapting materials and instruction to meet the needs of students with disabilities; (3) special education curricula that are derived from the school district's general education curricula, but allow for flexibility in addressing the individual needs of students with all types and levels of disabilities; and (4) curricula designed to develop skills in several areas, including basic skills, communication, social and interpersonal skills, vocational skills, self-help and independent living, the arts, civic and community responsibilities, and recreation skills.[223] These indicators, as well, focus on matching curricula to students' differing skills, abilities, and needs.

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[220] The Special Education Branch of the Nevada Department of Education completed a survey of special education teachers, related services personnel, and administrators in northern Nevada regarding areas in which they would most like training. Two hundred seventy-one professionals responded to the survey, and two of the four most frequently mentioned areas included least restrictive environment (special education/regular education interface, models for prereferral interventions, collaborative/cooperative models for service delivery) and behavior management (dealing with aggressive students, etc.). Christine O. Cheney and Mary Ann Demchak, "Preparing Rural Educators of Students with Severe Disabilities: Summer Institutes and Ongoing Support," in *Reaching to the Future: Boldly Facing Challenges in Rural Communities* (conference proceedings of the American Council on Rural Special Education, Las Vegas, NV, Mar. 15–18, 1995), *reproduced by* ERIC Document Reproduction Service, ED # 381 311.

[221] *See* Deanna J. Sands, Lois Adams, and Donna M. Stout, "A Statewide Exploration of the Nature and Use of Curriculum in Special Education," *Exceptional Children*, vol. 62 (September 1995), p. 68 (hereafter cited as Sands et al., "A Statewide Exploration"). The disagreement centers on whether the IEP should be a documentation of (1) the courses, activities, and services selected for the student based solely on her or his needs, not on the framework of the standard curriculum, or (2) the modifications and adaptations of standard curriculum needed to place the student within a standard curriculum, while also addressing his or her individual needs. *See* ibid.

[222] The study was based on the survey responses of 341 special education teachers in 9 Colorado school districts. Sands et al., "A Statewide Exploration," p. 68.

[223] Sands et al., "A Statewide Exploration," p. 68 (citing National Regional Resource Center Panel, *Effectiveness Indicators for Special Education: A Reference Tool* (Hampton, NH: Center for Resource Management, Inc., 1986) (ERIC Document

Legislative history on the IDEA reveals that Congress sought to ensure for students with disabilities an education that would meet their different needs and abilities in various subject areas. Although the act would guarantee for children with disabilities only "special education and related services,"[224] the Senate Committee reporting on S.6[225] noted that children with disabilities had a right to all the services and curricular options normally available to children without disabilities.[226] It pointed out that "[w]hile in some instances such services need to be specially designed for handicapped children, these services should be provided as a matter of course . . .," and it viewed section 504 as an avenue to ensure that services and curricular options provided to other children were made available for children with disabilities.[227] These statements provide some explanation of the congressional intent for the IDEA and section 504 in educating children with disabilities.

The language of the IDEA and the regulations for the IDEA and section 504 does not contain an express requirement to develop education programs for students with disabilities that meet their different needs and abilities in various subjects. However, taking into account congressional intent and the express requirements that do exist, the IDEA and section 504 support this concept in various ways.

First, they require that students with disabilities be provided a free appropriate public education.[228] Included in the definition of a free appropriate public education is the notion that the education must be "individualized"[229] or designed to meet the student's individual needs.[230] Therefore, inherent in a "free appropriate public education" is the understanding that each student is unique,

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[224] The purpose of the act was to "assure that all handicapped children have available to them. . .a free appropriate public education." Pub. L. No. 94–142, § 3(a), 89 Stat. 775 (1975). A free appropriate public education was defined as "special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5)." Id. § 4(a)(4).

[225] S.6 was the Senate bill that was passed by Congress and enacted as Pub. L. No. 94–142, the Education for All Handicapped Children Act of 1975 that eventually became the IDEA. *See* Pub. L. No. 94–142, 89 Stat. 773, *reprinted in* 1975 U.S.C.C.A.N. 94th Cong., 1st sess., vol. 1. *See also* 1975 U.S.C.C.A.N. 1425.

[226] The Committee pointed out that "in addition that a handicapped child has a right to receive all services normally provided a nonhandicapped child enrolled in a public elementary or secondary school. Thus, he or she has a right to physical education services, health screening, transportation services, and all other services which are provided to all children within the school system, and a right to as many options in curricula as are available to all children." S. Rep. No. 168, 94th Cong., 1st sess. 12 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1436.

[227] The Committee wrote that it "expects the Commissioner of Education to take such action under section 504 of the Rehabilitation Act of 1973 to assure that physical education and all other services normally provided to all children are made available for handicapped children." S. Rep. No. 168, 94th Cong., 1st sess. 12 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1436.

[228] *See* Pub. L. No. 105–17, § 612(a)(1) (1997); 34 C.F.R. §§ 300.121, 300.300 (1996); 34 C.F.R. § 104.33(a) (1996).

[229] The regulations implementing Part B of the IDEA define "free appropriate public education" as "special education and related services that (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an [*individualized* education program] that meets the requirements of §§ 300.340–300.350." 34 C.F.R. § 300.8 (1996) (emphasis added).

[230] The regulations implementing section 504 define an "appropriate education" as "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36." 34 C.F.R. § 104.33(b) (1996).

having needs and abilities distinct from those of other students, and the fact that students are diagnosed as having the same kind of disability does not mean that they have the same needs and abilities. According to the Department of Education's Office of Special Education Programs, simply "labeling" the students with a specific disability without doing more to ascertain the child's individualized needs does not meet educational standards or Federal legal requirements, and, indeed, acts as a barrier to an appropriate education.[231] Any program or placement based on a child's "label" rather than a more thorough or rigorous inquiry into that child's individual needs will violate Federal law.[232]

Second, the Federal provisions recognize that, within each student with a disability, there can be a wide range of needs and abilities. Because of the nature of a disability, a student may have difficulty in one area of study such as math, but not in others such as science or art. Further, a student may have nondisability-related needs requiring special services or assistance, such as giftedness in some areas of study or limited proficiency in English. To ensure that a student's broad range of needs and abilities are accurately identified, there are detailed IDEA and section 504 provisions on evaluation and placement. For example, by outlining procedural requirements to promote accuracy in identification and prevent misclassifications or misuse of evaluation methods, such as tests,[233] the provisions assist in ensuring that a student's limited proficiency in English is not confused with a speech impediment, a learning disability, or mental retardation.[234] Once the student's needs and abilities are identified, the school must determine what education services are necessary for the student and where they should be provided. To ensure that a student's differing needs and abilities are considered, the IDEA and section 504 regulations require that, in interpreting evaluation data and making placement decisions, the school draws upon information from a variety of sources.[235] They also require that placement decisions are made by a group of persons knowledgeable about the child, the mean-

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[231] *See* G. Thomas Bellamy, Director, Office of Special Education Programs, Office for Special Education and Rehabilitative Services, DOEd, letter to Patti C. Richards, re: Response to inquiry regarding the purpose of assigning categorical labels to children receiving special education under Pub. L. 94–142, Mar. 31, 1987, 211 EHLR 440 (stating that the purpose for "labeling" children as having a specific disability is to assist in determining an appropriate educational program and an appropriate placement for implementing a child's special education program).

[232] Ibid. In particular, the Office of Special Education Programs has stated:
"The central and unifying principle expressed in Federal law ensuring the rights of children with disabilities to free appropriate educational services is that each child's educational needs be *individually* evaluated and that an educational plan be *individually* developed and implemented to that child's unique needs. . . Whatever other purpose might be intended by agencies that publicly label children according to the category of their disability, the obvious utility of any labeling system is to identify characteristics universally shared with other children, *not to identify characteristics unique to each individual child*. The unavoidable consequence of such a labeling practice is to identify and plan to meet each child's educational needs on the basis of what that child has in common with other children similarly identified rather than that child's individualized needs. Thus, it is the view of this office that any labeling practice that categorizes children according to their disability *in order to facilitate the individual determination* of any child's appropriate educational needs or services will be presumed to violate the protections accorded under Federal and State laws." Ibid, p. 441 (emphasis added).

[233] *See* 34 C.F.R. § 300.532 (1996); 34 C.F.R. § 104.36 (1996).

[234] Legislative history on the IDEA reveals that a major concern of Congress in enacting Pub. L. No. 94–142 (the EHA) was problems of identification and classification, particularly: (1) the misuse of appropriate identification and classification data with the educational process itself; (2) discriminatory treatment as the result of the identification of a disability; and (3) misuse of identification procedures or methods which results in erroneous classification of a child having a disability. S. Rep. No. 168, 94th Cong., 1st sess. 1975, *reprinted in* 1975 U.S.C.C.A.N. 1425, 1450. The Senate Report notes that the Committee was taking positive action against erroneous classification of poor, minority, and bilingual children and that it intended for regulations to assure that a test administered to a student who is bilingual accurately reflect the child's ability in the area tested, not the fact that the child is not skilled in English. *Id.* at 1452–53. Therefore, it was the intent of Congress to ensure that testing and evaluation would distinguish between a student's disability-related needs and nondisability-related needs. *See* 34 C.F.R. § 300.532(a)(1) (1996); 34 C.F.R. § 500.532(c) (1996); 34 C.F.R. § 104.35(b)(3) (1996).

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ing of the evaluation data, and the placement options.[236] Finally, the IDEA and section 504 regulations place a substantive requirement on placement decisions. Students with disabilities must be placed in the regular education environment unless the nature or severity of their disabilities is such that the students cannot achieve satisfactorily in the regular class with supplementary aids and services.[237] This requirement extends to academic and nonacademic settings and includes extracurricular activities and services.[238] By providing guidelines to ensure that (1) a student's educational needs are identified accurately; (2) placement and program decisions are made based on knowledge of a student's differing needs and abilities; and (3) placement occurs in the regular class unless a student's needs require a different setting, the IDEA and section 504 provisions promote development of educational programs that meet a student's differing needs and abilities in various subject areas.

Third, section 504 and its implementing regulations prohibit discrimination on the basis of a person's disability and promote equal access to education programs and services.[239] For a student who has needs or abilities requiring participation in certain classes or provision of certain services, section 504 and its implementing regulations prohibit denial from participation in and exclusion from those programs and services, to a qualified person, because of a disability.[240] Therefore, for a student seeking admission to a gifted and talented program, needing language assistance services to address limited proficiency in English, or seeking participation in a music, art, or physical education class, section 504 prohibits the exclusion or denial from these programs, services, and classes if the student has the needs or abilities necessary for participating in the program or receiving the services.

In sum, the IDEA and section 504 promote evaluation of a student with a disability that identifies accurately the student's different needs and abilities; the development of an education program that reflects those differing needs and abilities; and equal access to programs and services necessary to meet the student's needs and abilities. The implications of these requirements are that a student with a disability whose needs and abilities are identified may receive varying types of educational instruction and services in a variety of settings, depending on what is necessary to meet that student's different needs and abilities. Whether this goal is met, however, depends on the extent to which State education agencies and public schools adhere to the IDEA, section 504, and the intent of those laws and their regulations.

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[235] 34 C.F.R. § 300.533(a) (1996); 34 C.F.R. § 104.35(c) (1996).

[236] 34 C.F.R. § 104.35(c) (1996).

[237] 34 C.F.R. § 300.550(b) (1996); 34 C.F.R. § 104.34 (1996) (requires placement of students with disabilities in the regular education environment and specifies that placement in special classes or separate schools should occur only when the nature or severity of their disability is such that the students cannot achieve satisfactorily in the regular class with supplementary aids and services).

[238] *See* 34 C.F.R. §§ 300.550, 300.553 (1996); 34 C.F.R. § 104.34 (1996).

[239] 29 U.S.C. § 794 (1994); 34 C.F.R. § 104.4 (1996).

[240] The student with a disability seeking access to the special programs or services must be "qualified" for the programs or services in order to be protected by section 504 and its implementing regulations. *See* 29 U.S.C. § 794 (1994) ("No otherwise *qualified* individual with a disability. . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under. . .) (emphasis added); 34 C.F.R. § 104.4(a) (1996) ("No *qualified* handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination. . .) (emphasis added).

States have provisions requiring an individualized education reflecting the unique needs and abilities of each student with a disability.[241] Similarly, there are State and local policies and procedures to promote the accurate identification of disabilities and to discern a student's varying needs and abilities.[242] In practice, however, schools may fail to implement the full intent of Federal requirements. For example, although school districts are required to develop individualized education programs for students with disabilities,[243] some make mistakes in crafting individualized education programs, such as failing to use proper evaluations in placing students and failing to include appropriate personnel at meetings to discuss each student's education program.[244] These mistakes can reduce the overall effectiveness of students' education programs,[245] and they can prevent students with disabilities from receiving an education that adequately meets their different needs and abilities in various subject areas.

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[241] For example, a North Carolina State statute states that an IEP must contain: (1) a statement of the child's present levels of educational performance; (2) a statement of annual goals; (3) a statement of short-term instructional objectives; (4) a statement of specific education and related services to be provided to the child; a description of the extent to which the child will participate in regular education programs or natural preschool environments and a description of the program to be provided; (6) the projected dates for initiation of services and the anticipated duration of services; (7) objective criteria, evaluation procedures, and schedule for determining, on a least an annual basis, whether the short-term instructional objectives are being achieved. *See* North Carolina State Plan For Fiscal Years 1993–95 Under Title VI, Part B, Education of the Handicapped Act As Amended By Public Law 94–142, Public Law 99–457, Public Law 101–476, and Public Law 102–119 (hereafter cited as North Carolina State Plan).

The Maryland State Department of Education also requires that each public agency develop and implement an IEP for each student with a disability (COMAR § 300.341). State regulations set requirements for the development, implementation, review, and revision of IEPs (COMAR § 300.342–300.349). The regulations also require that public agencies conduct specific activities to ensure that they remain in compliance with those regulations.

The State of Washington defines an appropriate education as an education directed to the unique needs, abilities, and limitations of each student with a disability. *See* The Common School Manual 1995, Common School Laws of the State of Washington (Title 28A RCW and Other Selected Laws): Rules and Regulations of the State Board of Education (Title 180 WAC), Rules and Regulations of the Superintendent of Public Instruction (Title 392 WAC), RCW 28A.155.020.

[242] North Carolina State education policy states that screening and evaluation are the responsibility of the school-based committee or preschool transition/placement committee and professionals qualified to administer and determine the results of certain technical tests and procedures that are designed to screen or evaluate a pupil's strengths and weaknesses in specific areas of learning and/or behavior. Such professionals may be available within the city and the county school administrative units or from other appropriate agencies (e.g., mental health centers, public health departments and development evaluation clinics). *See* North Carolina Department of Public Instruction, Division of Exceptional Children's Services, *Procedures Governing Programs and Services for Children with Special Needs*, 1993; Charlotte-Mecklenburg Schools, *Program for the Gifted Handbook*. New Jersey Administrative Code Title 6 Education: Chapter 28 Special Education, requires, in part, that "the initial evaluation shall consist of an assessment by a school psychologist, a learning disabilities teacher-consultant, a school social worker and a physician employed by the school. The child study team evaluation shall include an appraisal of the pupil's current functioning and an analysis of instructional complication(s) appropriate to the child study team member reporting." (N.J.A.C 6:28–3.4(d)). The statute also states that "one or more informal measure(s) [used during student evaluation] may include, but not be limited to: (1) Surveys and inventories; (2) analysis of work samples; (3) trial teaching; (4) self report; (5) criterion referenced tests; (6) curriculum based assessment; and (7) informal rating scales" (N.J.A.C. 6:28–3.4(vi)).

[243] *See* 34 C.F.R. § 300.341 (1996) (as a condition to receiving Part B IDEA funds, the SEA "shall ensure that each public agency develops and implements an IEP for each of its children with disabilities.").

[244] *See* "Want to Avoid Litigation? Look at the IEP," *California Special Education Alert*, vol. 2, no. 11 (LRP Publications, June 1996) (At the 17th National Institute on Legal Issues of Educating Individuals with Disabilities, Reed Martin, whom the article describes as "one of the country's leading special education attorneys representing parents" offered his opinion as to the "top 15 mistakes" school districts make in crafting IEPs. Martin's list included the following: failure to provide appropriate notice to parents; failure to have appropriate personnel at the IEP meeting; failure to base the IEP on proper evaluations; failure to discuss methodology including alternative methodologies that may better address the "unique needs" of the student at the IEP meeting; failure to cover all elements of the IEP required in IDEA regulations; failure to provide related services based on the needs of the child or refusal to provide services due to unavailability; failure to choose the placement only after the IEP is developed because all too often, districts decide students with a certain disability will go to

As a result, compliance with and enforcement of the Federal requirements often is the key to ensuring that the different needs and abilities of students with disabilities are met. For example, in a 1994 administrative case brought under the IDEA, the State reviewing officer determined that, although the school district appropriately classified the student as having a learning disability, it failed to develop an appropriate education program for the student. The IEP developed by the district indicated that the student would receive primary instruction in special education for *all* subjects. The State reviewing officer found that such instruction was appropriate to address the child's academic needs in reading, writing, spelling, and mathematics, because the disability affected the child's ability to acquire skills in these subjects. However, the reviewing officer also found that there was insufficient basis for providing the child with special education for science, social studies, music, and art. Consequently, the child could not be excluded from regular education classes for those subjects.[246] Through enforcement of IDEA and similar State requirements, the child was able to receive an individualized education in settings that met the child's differential needs and abilities. For section 504, OCR has been a primary means by which individuals have sought enforcement under that law. A review of OCR's implementation, compliance, and enforcement efforts reveals different approaches to ensuring that educational programs for students with disabilities reflect their different needs and abilities in various subjects.

The Education Afforded to Students with Disabilities as It Reflects Students' Different Needs and Abilities: OCR's Enforcement Efforts

In implementing and enforcing section 504, OCR has helped to ensure that students with disabilities are provided an education that meets their different needs and abilities. As mentioned above, provisions in the section 504 regulations serve as a guideline and "check" to ensure that the different needs and abilities of students with disabilities are identified and met. For example, one way that OCR has addressed the concept is in defining an appropriate education as one "designed to meet *individual* educational needs of [persons with disabilities] as adequately as the needs of [persons without disabilities] are met."[247] Incorporated into the concept of an appropriate education is the notion of an individualized or tailored education.[248]

To ensure the provision of an education that is individualized and appropriate, the section 504 regulations contain specific requirements on the evaluation, assessment, and placement decision-making for students that emphasize their individual educational needs.[249] For example, the regu-

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a certain placement, and then write the IEP to fit the placement; failure to provide for extended school year services; failure to reasonably calculate the IEP to confer educational benefit; failure to recognize the dual protection of section 504 and the IDEA, in particular that section 504 applies to all IDEA-eligible students, and schools should always consider section 504 eligibility; and failure to ensure the IEP is implemented, including failure to inform all the child's teachers about the IEP, and failure to make sure teachers follow through.).

[245] Ibid.

[246] Board of Educ. of the City Sch. Dist. of the City of NY, No. 94–8, Apr. 28, 1994, *reprinted in* 21 IDELR 472, 475.

[247] 34 C.F.R. § 104.33(b)(1) (1996) (emphasis added).

[248] Some commentators have described this notion of providing an individualized education as "individual accommodations." *See* Perry A. Zirkel and Jeanne M. Kincaid, *Section 504 and the Schools, Supplement I* (Horsham, PA: LRP Publications, 1994), part 3, p. 61 ("nondiscrimination means the provision of individual accommodations that provide a free appropriate public education to each eligible student rather than equal treatment of all students regardless of disability").

[249] *See* 34 C.F.R. pt. 104, app. A, no. 25 (1996) (The procedures outlined at 34 C.F.R. §§ 104.35 and 104.36 are designed "to ensure appropriate classification and placement.").

lations state that the group of persons making placement decisions must include "persons knowledgeable about the child."[250] It requires that evaluations and placement decisions account for a child's background and specific educational needs. In addition, the regulations state: "[i]n interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. . ."[251]

The section 504 regulations also require that testing and evaluation materials (1) be validated; (2) be administered properly by trained personnel; (3) include those tailored to assess the student's specific areas of educational need, not merely those designed to provide a single intelligence quotient; and (4) be selected and administered to accurately reflect the student's aptitude, achievement level, or other factor that the test purports to measure, so as not to reflect a student's impaired skills unless they are the factors being measured.[252] In addition, the regulation requires that the information obtained from all sources be documented and carefully considered.[253]

In viewing all of these requirements as a whole, OCR has incorporated the concept of an individualized education in its section 504 regulations by two means. First, it has created a substantive requirement at section 104.33(b) that school districts provide students with disabilities with an education that meets the students' individual educational needs as adequately as the needs of nondisabled students. Second, to ensure that school districts provide an individualized, appropriate education, OCR added procedural requirements for school districts to follow in evaluating and placing the students. In essence, the procedural requirements serve as the foundation or guideline from which it can be determined whether the actual education afforded to a student with a disability meets the student's individual educational needs.

OCR considers several factors in determining whether a school has complied with the requirements of section 104.33(b) and, thus, provided an appropriate education that meets the student's individual educational needs. Although the section 504 regulations do not require an "individualized education program" as required by IDEA Part B,[254] the regulations state that implementation of an individualized education program (IEP) developed in accordance with the standards of IDEA Part B is one means of meeting the section 504 standard.[255] Therefore, OCR will consider this as meeting the requirements of section 504.

The IDEA Part B requirements for an IEP and the development of the IEP are extremely detailed and specific. An IEP must be a written statement for a child with a disability that describes (1) the child's current educational performance levels, annual goals and short-term objectives for the child, (2) the specific educational services to be provided to the child, (3) the extent to which the child will be able to participate in regular educational programs, (4) the projected starting date and duration of the services, and (5) objective criteria and evaluation procedures and schedules for determining whether objectives have been achieved.[256] Further, when a student reaches the age of 16, the IEP also must describe transition services to be provided to assist the student in adjusting to adult life.[257]

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[250] 34 C.F.R. § 104.35(c)(3) (1996).

[251] 34 C.F.R. § 104.35(c) (1996).

[252] *Id.*

[253] *Id.*

[254] *See* Lim and Hehir response to Williams inquiry, p. 7 ("The most significant difference between the FAPE requirements of Section 504 and those of Part B is that Part B [of the IDEA] requires FAPE, consisting of special education and related services, implemented on the basis of an IEP document, whereas Section 504 requires FAPE, consisting of regular or special education and related aids and services, as implemented by any appropriate means, including, but not limited to, an IEP.").

[255] 34 C.F.R. § 104.33(b)(2) (1996).

IDEA Part B also requires that, at the beginning of each school year, each school system must have in effect an IEP for each child or youth having a disability and needing special education or related services.[258] The IEP must have been developed in accordance with Federal regulations. It must be regarded by both the parents and the school system as appropriate in terms of the child's needs, specified goals and objectives, and the services to be provided. Also, it must be intended to be implemented as it is written.[259] It is the public school system's responsibility to initiate and conduct meetings for the purpose of developing, reviewing, or revising an IEP.[260] The school system must review each child's IEP periodically and, if appropriate, revise the provisions. This review should occur at least once a year.[261]

Neither IDEA Part B nor its implementing regulations specify the format for how an IEP meeting should be conducted. Consequently, State and local practices control the format of IEP meetings.[262] However, the IEP meetings must include: (1) a representative of the school system, other than the child's teacher, who must be qualified to provide or to supervise the provision of specially designed instruction to meet the child's unique needs; (2) the child's teacher; (3) one or both of the child's parents or the child's guardian; and (5) whenever appropriate, the child.[263] Other individuals may attend IEP meetings at the discretion of the parents or guardians or the school system.[264] If the child has been evaluated for the first time, the school system must ensure that a member of the evaluation team, or another person who is knowledgeable of the evaluation procedures used with the child and familiar with the results of the evaluation, is present at the meeting.[265] If the school system is considering placement in a private school or facility, the school system should ensure that a representative of that private school or facility participates in the IEP meeting.[266]

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[256] Pub. L. No. 105–17, § 614(d)(1)(A) (1997); 34 C.F.R. §§ 300.340, 300.346 (1996).

The purpose of the IEP is to provide the child with a free appropriate public education tailored to his or her unique needs, abilities, and development. It sets forth in writing the school system's commitment of resources that will enable the child to receive needed special education and related services. *See* 34 C.F.R. pt. 300, app. C(I)(c) (1994). It is a management tool used to ensure that the child receives special education and related services appropriate to his or her needs. *Id.* at pt. 300, app. C(I)(d). It functions as a compliance/monitoring document used by monitoring personnel to determine whether a child with a disability actually is receiving the free appropriate public education agreed to by the parents and school system. *Id.* at pt. 300, app. C(I)(e). In addition, the IEP serves as an evaluation device in determining the extent of the child's progress toward meeting the project outcomes. *Id.* at pt. 300, app. C(I)(f).

[257] Pub. L. No. 105–17, § 614(d)(1)(A)(vii) (1997); 34 C.F.R. § 300.346 (1996). If an infant or toddler is receiving early intervention services under the IDEA's Part C program, there must be an individualized family service plan (IFSP) stating the services to be provided to the child and the family. Pub. L. No. 105–17, § 614(d)(2)(B) (1997).

[258] 34 C.F.R. § 300.342(a) (1996).

[259] 34 C.F.R. pt. 300, app. C, question 3 (1996).

[260] 34 C.F.R. § 300.343(a) (1996). If the parents of a child with a disability believe that the child is not progressing satisfactorily or that there is a problem with the child's current IEP, it is appropriate for the parents to request an IEP meeting. The school system should grant any reasonable request. *Id.* at pt. 300, app. C, question 11.

[261] 34 C.F.R. § 300.343(d) (1996).

[262] *See* 34 C.F.R. §§ 300.343–300.345 (1996). *See also* Weber, *Special Education Law and Litigation Treatise*, p. 5:4.

[263] Pub. L. No. 105–17, § 614(d)(B) (1997); 34 C.F.R. § 300.344(a) (1996).

[264] 34 C.F.R. § 300.344(a)(5) (1996).

[265] 34 C.F.R. § 300.344(b) (1996).

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Because the failure to meet IDEA Part B requirements does not necessarily violate section 504, OCR's analytical approach in determining compliance with section 104.33(b) "does not track a recipient's alleged failure to have or implement correctly an IEP document."[267] Instead, OCR considers (1) whether a child's needs were determined on an individualized basis; (2) whether the evaluation and placement procedures that were applied conformed with those specified in the section 504 regulations; and (3) whether the placement, aids, and services identified by the recipient through this process as necessary to meet the student's individual needs are being provided. Even in cases where a recipient has developed procedures for conforming with the IDEA, *"OCR's analysis of Section 504 compliance is not coextensive with an analysis of the recipient's compliance with the parallel sections of the [IDEA] regulation."*[268]

Although OCR's section 504 analysis is distinct from an IDEA analysis, OCR considers the contents of an IEP, regardless of whether it meets IDEA requirements, "as important evidence of whether the requirements of Section 504 have been met."[269] As a matter of policy and practice, the IEP document plays a significant role in the analysis OCR applies in determining compliance[270] because it serves as an indicator of a student's individual educational needs and the resources necessary to meet those needs.[271]

For example, in a 1995 Georgia case, the complainant alleged that the district did not provide the student with the amount of community-based training specified in the student's IEP because there were not enough paraprofessionals in the student's class to implement her IEP. OCR found the school district in violation of the section 504 regulation because it failed to provide a student with mental disabilities the amount of training specified in her IEP. In this case OCR found that (1) the student's IEP required that she receive community-based training twice per week; (2) one certified special education teacher and two paraprofessionals were assigned to the student's class; (3) classroom attendance by both paraprofessionals was very sporadic and on many occasions at least one paraprofessional was not present; and

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[266] 34 C.F.R. § 300.348(a)(2) (1996).

[267] LeGree S. Daniels, Assistant Secretary for Civil Rights, DOEd, memorandum to OCR Senior Staff, "Guidance Concerning Distinctions Between Section 504 and the Education of the Handicapped Act," Oct. 24, 1988, p. 4 (hereafter cited as Daniels, "Guidance on Section 504 and EHA Distinctions" policy memorandum). "OCR should not analyze the facts in terms of imperfections in or deviations from the IEP document." Ibid., p. 5.

[268] Ibid., p. 4 (emphasis added).

[269] Ibid. An IEP that meets IDEA requirements would describe (1) the child's current educational performance levels, annual goals and short-term objectives for the child, (2) the specific educational services to be provided to the child, (3) the extent to which the child will be able to participate in regular educational programs, (4) the projected starting date and duration of the services, and (5) objective criteria and evaluation procedures and schedules for determining whether objectives have been achieved. *See* Pub. L. No. 105–17, § 614(d)(1)(A) (1997); 34 C.F.R. §§ 300.340, 300.346 (1996).

[270] Daniels, "Guidance on Section 504 and EHA Distinctions" policy memorandum, p. 6.

[271] *See, e.g.*, Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DoEd, letter to Robert Bushong, Superintendent, Muscogee County School District, Columbus, GA, re: Complaint No. 04–94–1254, May 1, 1995, *reprinted in* 22 IDELR 1138, 1139 (hereafter cited as OCR Complaint No. 04–94–1254, 22 IDELR 1138); Harry Orris, Director, Cleveland Field Office, OCR, Region V, DOEd, letter to Elba S. Berlin, Superintendent, Jackson Public School District, Jackson, MI, re: Complaint Nos. 15–95–1133 and 15–95–1149, Nov. 1, 1995, *reprinted in* 24 IDELR 75; OCR, Region IX, DOEd, letter to Kenneth G. Matias, Superintendent, Gateway Unified School District, Redding, CA, re: Complaint No. 09–95–1294–I, Nov. 22, 1995, *reprinted in* 24 IDELR 80; OCR, Region III, DOEd, letter to JoAnn B. Manning, Chester Upland School District, Chester, PA, re: Complaint No. 03–95–1234, Nov. 9, 1995, *reprinted in* 24 IDELR 79; Charles Smailer, Team Leader, OCR, Region III, DOEd, letter to Manuel Arvon, Superintendent, Boone County School District, Madison, WV, re: Complaint No. 03–95–1168, Dec. 14, 1995, *reprinted in* 24 IDELR 475; Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Bobbi D'Alessandro, Superintendent, Lee County School District, Ft. Myers, FL, re: Complaint No. 04–95–1427, Dec. 8, 1995, *reprinted in* 24 IDELR 299.

(4) according to the teacher, both paraprofessionals had to be present in order to implement the student's IEP. OCR determined that "[g]iven the frequent absence of the paraprofessionals assigned to this class and the particular needs of the six students assigned to this class, the teacher could not fully implement the Student's IEP."[272]

In some cases, however, the information necessary for OCR's analysis is not in the IEP document, and "OCR must look beyond the IEP document to determine whether the school district has identified the child's needs, described the necessary program somewhere, and provided services in amounts that the district has determined as necessary, according to the process requirements of the Section 504 regulation."[273] To obtain this information, OCR conducts further investigative factfinding. For example, in one case, the complainant alleged that the school district failed to implement her daughter's IEP as it related to work study. The initial IEP specified that the student would participate in a work study program from 11:15 to 1:30, and the amended IEP specified 12:30 to 1:00. Neither IEP, however, indicated the specific days of the program, the location of the program, or the actual time devoted to working. According to the district staff, the student never was intended to work more than 30 minutes a day. The complainant contended that she thought her daughter would be working more hours. OCR conducted interviews with the complainant and IEP committee members to determine what amount of time the student should have spent working and what hours the student was allowed to work.[274] In another case, the complainants alleged that the student needed to receive a specific program of instructional services known as "Structure of Intellect" (SOI) services in a resource room and that the district failed to provide such services in the resource room after January 1994. OCR found that, although the IEP team agreed that SOI instruction would be used, there was no written documentation in the student's IEP or elsewhere reflecting where the team expected the SOI materials to be used, nor did the student's evaluation specify where such services were to be provided. OCR conducted interviews to determine whether the district provided the SOI services determined as necessary to meet the student's individual needs.[275]

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[272] Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Robert Bushong, Superintendent, Muscogee County School District, Columbus, GA, re: Complaint No. 04–94–1254, May 1, 1995, *reprinted in* 22 IDELR 1138, 1139.

[273] Daniels, "Guidance on Section 504 and EHA Distinctions" policy memorandum, p. 6.

[274] OCR found that the student traveled to the junior high school to participate in the work study under the initial IEP; under the amended IEP, she remained at the high school she normally attended. It determined that the district had provided the student with the requisite work study determined to meet her individual needs. OCR agreed that the required actual work time was one-half hour based on the interviews and noted that the district's contention "is supported by the fact that when the student's work study location changed to the high school, the time previously provided for lunch and commuting was eliminated." Dr. Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to David J. Sheneman, Superintendent, Bradford Area School District, Bradford, PA, re: Complaint No. 03–93–1037, May 17, 1993, *reprinted in* 20 IDELR 381, 381–83 (hereafter cited as OCR, Complaint No. 03–93–1037, 20 IDELR 381).

[275] OCR found that the complainants, the SOI's consultant, the principal, the student's special education teacher, and two regular education teachers had different understandings of where the student would receive SOI services. OCR also found that the student received SOI instruction in the resource room beginning in September 1993 and that, in January 1994, SOI instruction began in the regular education classroom, as part of a district decision made prior to the beginning of the school year to provide all students in the student's regular classroom SOI instruction. According to the special education teacher, she adjusted her use of SOI materials in the resource room to complement, but not duplicate materials used in the regular classrooms. OCR determined that, since the district had complied with the procedural requirements on evaluation and placement decisions, and since the district had provided the student with SOI services determined as necessary to meet the student's individual needs, the district was in compliance with the section 504 regulation. Gary D. Jackson, Regional Civil Rights Director, OCR, Region X, DOEd, letter to Bill Prenevost, Superintendent, Monroe School District No. 103, Monroe, WA, re: Complaint No. 10-94-1155, Nov. 16, 1994, *reprinted in* 22 IDELR 256, 257.

According to OCR policy, the section 504 regulations, by implication, require that the needs and services for a student be identified "with sufficient specificity (not necessarily in the IEP document) to assure OCR that the child's needs have been derived on an individual basis."[276] Neither the section 504 regulations nor OCR policy requires written documentation of a student's specific needs, the necessary program for that student, or the actual services provided;[277] nor does either encourage such information to be available in written form. Therefore, for OCR to make a finding of compliance with section 504, there must be evidence, through the statements of the student, the parents, teachers, evaluators, and other staff, school records, or other means, that the school identified the specific needs and services for the student and that it actually provided the identified services.

From a proactive and preventive standpoint, school districts would benefit from documenting this information in school records or in the IEPs, to ensure compliance with section 504 and to better assure that they are providing each student with a disability an education that meets his or her individual educational needs. In fact, at least one school district and two States use or encourage the use of written section 504 plans. For example, Prince Georges County Public Schools in Maryland provides "accessibility plans" for students who are eligible for services under section 504 but not under IDEA Part B.[278] In documents describing section 504 compliance requirements, the Montana Office of Public Instruction recommends the use of a written plan, and the New York State Education Department encourages the creation of an "accommodation plan," for students eligible for FAPE only under section 504.[279] Written documentation of this information also would assist OCR in conducting section 504 investigations and compliance reviews. However, for school districts to take this action they need a clear understanding of OCR's section 504 standards and the type and specificity of information required for compliance with section 504.

One point OCR emphasizes in policy is that it does not make an independent judgment of the child's needs when conducting its analysis, nor does it substitute its judgment for the recipient's in determining need.[280] This approach follows OCR's general policy of deference to the educational decisions of school districts in identifying educational needs and providing education and related services.[281] For this reason, OCR's analysis in determining whether a school district has provided an appropriate and individualized education is largely process oriented.[282] OCR's main focus is in determining whether the school district adhered to the section 504 procedural requirements.[283] In cases where (1) a school district has followed all of the section 504 procedural requirements for evaluating a student, determining that student's needs, and making a placement decision; and (2) the only issue is whether the school district's determinations and decisions are educationally correct or sound, OCR generally does not resolve the issue. According to OCR, the appropriate means for resolving placement or other disputes over substantive educational decisions would be a due process hearing.[284] OCR, therefore, will not review the result of IEPs and other educational decisions except (1) under extraordinary circumstances;[285] and (2) insofar as the decisions inform OCR's analysis in determining whether a school district is complying with process requirements as set out in section 504, the ADA, and their respective regulations.[286]

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[276] Daniels, "Guidance on Section 504 and EHA Distinctions" policy memorandum, p. 6.

[277] The regulation does specify that the school district shall establish procedures to ensure that certain information is documented and carefully considered in interpreting evaluation data and making placement decisions. This information includes the results of aptitude and achievement tests and information on teacher recommendations, physical condition, social or cultural background, and adaptive behavior. *See* 34 C.F.R. § 104.35(c)(1)–(2) (1996).

[278] Robert Coombs, Director of Special Education, and Lexa Comstock, Compliance and Due Process, Office of Special Education, Prince Georges County Public Schools, interview in Upper Marlboro, MD, Apr. 11, 1996, p. 4; Prince Georges County Public Schools, Department of Special Education, "Summary of ARD Placement Procedures," *Handbook of Administrative Procedures, F.Y. 94 Edition* (September 1993), sec. VIII (Forms).

[279] *See* Zirkel and Kincaid, *Section 504 and the Schools*, app. 1:14, 1:20.

[280] Daniels, "Guidance on Section 504 and EHA Distinctions" policy memorandum, pp. 5–6.

[281] *See* 34 C.F.R. pt. 104, app. A, subpt. D (1996).

[282] *See* OCR, Complaint No. 03–93–1037, 20 IDELR 381, 384 ("OCR does not review the result of the individual placement and other educational decisions so long as the school district complies, as here, with the process requirements of the regulation.").

[283] *See* OCR Complaint No. 03–93–1037, 20 IDELR 381, 384 (Complainant alleged that the district failed to provide vocational

From a conceptual basis, this approach to civil rights compliance provides a sensible balance to ensuring that persons with disabilities have a free appropriate public education under section 504.[287] The section 504 regulations are guideline requirements for school districts to comply with section 504 law. They inform schools on how to provide education that meets the individual educational needs of students with disabilities as adequately as the needs of those without disabilities are met. Therefore, in developing an education program for a student with a disability, school districts must adhere to the regulations' evaluation, placement, procedural safeguard, and other specific requirements as well as the general requirements prohibiting exclusion, denial, or discrimination. If the regulations contain all essential elements recognized by educators, students with disabilities and their parents for identifying and meeting a student with a disability's educational needs, then it is reasonable to assume that full compliance with the language and intent of the provisions will yield an education that meets the educational needs of the student as adequately as the needs of students without disabilities are met.[288]

In situations where there is evidence that a school district has (1) used trained professionals to properly administer valid evaluation materials in assessing a student's needs and abilities; (2) relied on various sources of information about that student in deciding the services and settings needed for the student; (3) relied on a group of persons knowledgeable about the different needs

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training and the speech and language therapy necessary to meet the student's individual education needs. OCR found that in reaching its decision, the district followed formal evaluation and placement procedures which were consistent with the section 504 regulation, and, therefore, the district was in compliance with the section 502 regulation.) *See also* OCR Complaint No. 04–95–1028, 22 IDELR 904 (hereafter cited as OCR Complaint No. 04–95–1028, 22 IDELR 904); Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DOEd, letter to C. Monica Uhlhom, Superintendent, Palm Beach County Sch. Dist., West Palm Beach, FL, re: Complaint No. 04–95–1247, May 12, 1995, *reprinted in* 23 IDELR 56 (hereafter cited as OCR Complaint No. 04–95–1247, 23 IDELR 56).

[284] *See* Capistrano (CA) Unified Sch. Dist., 22 IDELR 582; OCR, Region IV, DOEd, letter to Fred Johnson, Assistant Superintendent, Shelby County School District, Memphis, TN, re: Complaint No. 04–95–1028, Apr. 27, 1995, *reprinted in* 22 IDELR 904, 905; OCR Complaint No. 04–95–1247, 23 IDELR 56, 57.

[285] To date, OCR has not provided a clear definition in it policy guidance as to what circumstances it would consider "extraordinary."

[286] *See* OCR Complaint No. 04–95–1028, 22 IDELR 904 (stating that "[i]t is not the intention of the Department, however, to review the result of individual placement decisions except in extraordinary circumstances, so long as the school district complies with the 'process' requirements of Section 104.35"); OCR, Complaint No. 03–93–1037, 20 IDELR 381.

[287] This analysis does not address whether OCR's process-oriented approach, in practice, has been an effective civil rights practice because to make that assessment from OCR's practices, an extensive review of OCR's cases and interviews with OCR staff would be necessary.

[288] The requirements were created by DOEd, with extensive public comment and consultation by educators, advocates, persons with disabilities and their parents throughout the country. The intent seemed to be to develop educationally sound requirements that would guide school districts in the steps necessary for preventing misclassifications and providing students with disabilities an appropriate education. In various sections of this report, the Commission has identified areas where the section 504 regulation should be modified or where further policy clarification or guidance is needed.

and abilities of the child for the decisionmaking; (4) placed the child in regular class unless he or she could not achieve satisfactorily there with the use of supplemental aids and services; and (5) complied with all provisions in the section 504 regulation, it is reasonable to assume that the ultimate decisions determined by the process are appropriate for the student and meet his or her individual educational needs. Again, such results are likely to occur because OCR developed regulation requirements with the principal concern of serving individual student needs.

Substantive questions, such as determining what the student's needs are and how those needs should be addressed, are complex issues requiring personal knowledge of the student, specialized training in how to identify disabilities, and training and experience in how to determine what educational strategies best meet particular educational needs and what placement settings are best for a particular student. The regulations leave these decisions to a group-based process that is guided by educationally sound civil rights requirements. Therefore, OCR's approach to refrain from reviewing the result of individual placement and other educational decisions, except in extraordinary circumstances, and to assume a "process-oriented" approach provides a sensible balance. With this approach, (1) there are educationally sound civil rights requirements in place to guide education practices; (2) there is deference to the educational decisions made by those with specialized training and knowledge, and informed by a group-based process that considers a variety of sources of information about the child; (3) there is implementation of the Federal role to enforce Federal civil rights laws; and (4) there is a review of individual educational decisions by the Federal authority only under extraordinary circumstances to protect the educational interests of the child.

Recognizing the Nondisability-Related Needs of Students with Disabilities

Educational and Policy Perspectives

According to education researchers, one difficulty in recognizing different needs of students with disabilities is identifying nondisability-related needs. Such needs include giftedness or limited English proficiency.[289] Researchers attribute the difficulty to perceptions that a student's disability is his or her single, salient characteristic, with no recognition that the disability reflects only one of many individual characteristics defining a student's needs and abilities.[290] Moreover, teachers and other evaluators sometimes perceive the student's disability solely as a problem that can prevent educational development rather than as a difference that does not have to impact negatively on the student's development.[291] Therefore, an important aspect to addressing a student's individual needs is identifying and serving all needs, including those unrelated to the disability.

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[289] *See generally* James H. Humphrey, *Helping Learning-Disabled Gifted Children Learn Through Compensatory Active Play* (Springfield: Charles C. Thomas, 1990); Lynn H. Fox, Linda Brady, and Dianne Tobin, *Learning Disabled / Gifted Children: Identification and Programming* (Baltimore: University Park Press, 1983), p. ix (hereafter cited as Fox et al., *Learning Disabled / Gifted Children*); Paul R. Daniels, *Teaching the Gifted / Learning Disabled Child* (Rockville, MD: Aspen Publication, 1983); Anne Udall, chapter review in Joanne R. Whitmore and C. June Maker, *Intellectual Giftedness in Disabled Persons* (Rockville, MD: Aspen Publication, 1985) (hereafter cited as Udall in *Intellectual Giftedness in Disabled Persons*); Anne C. Willig and Hinda F. Greenberg, eds., *Bilingualism and Learning Disabilities: Policy and Practice for Teachers and Administrators* (New York: American Library Publishing Co., Inc., 1986); Leonard M. Baca and Hermes T. Cervantes, *The Bilingual Special Education Interface* (Columbus, OH: Merrill Publishing Co., 1989). *See also* Caroline M. Bredekamp, *The Gifted / Learning Disabled Student: A Contradiction in the Classroom* (Master's Thesis, University of Northern Iowa, July 1993) (reviewing literature concerning identification processes and appropriate learning strategies for gifted/learning disabled students).

[290] *See* Humphrey, *Helping Learning-Disabled Gifted Children*, p. v (estimating that approximately 3 percent of the school population can be classified as gifted and, further, that about 5 to 8 percent of this number suffer from some type of learning disability). *See also* Fox et al., *Learning Disabled / Gifted Children*, p. 1 (contending that gifted students and learning disabled students are commonly regarded as separate populations and that few people pay attention to students in both groups and noting that "[e]ducators who work with learning-disabled children frequently overlook that some of these students may be gifted, and educators who work with the gifted do not look for learning disabilities among their students."); Daniels, *Teaching the Gifted / Learning Disabled*, p. 6; Udall in *Intellectual Giftedness in Disabled Persons*, pp. 207–09.

Education researchers have identified several factors that contribute to the difficulty in identifying a student's nondisability-related needs. In detecting giftedness in students with disabilities, educators in gifted education expect students to score highly in all areas of assessment and screening practices such as standardized tests.[292] This expectation coincides with doubts of whether students who display high levels of overall achievement, or high achievement in one area, but who also have deficit area(s) are qualified for gifted programs. According to one scholar, the general skepticism among educators on the presence of giftedness in the learning disabled has prevented proper identification and placement of students who are gifted and learning disabled. She contends that only a small portion of students who are gifted/learning disabled are ever identified as members of either group. Instead, students with gifts and deficits are more often assessed and placed in programs according to their weaknesses rather than their strengths. As a result, this student population suffers from a lack of resources and services designed to meet their individual needs.[293]

To identify all educational needs of a student, educators emphasize that, when evaluating a student for special education, the use of multiple criteria is crucial to identifying and distinguishing nondisability-related characteristics.[294] For example, in making placement decisions for gifted or limited-English-proficient students with disabilities, the use of a "variety of sources" and "persons knowledgeable about the child" is crucial because students who are gifted and learning disabled or limited English proficient and learning disabled are extremely difficult to identify with traditional procedures used in schools in the United States.[295] For example, an estimated 70 percent of gifted individuals may not be identified if group administered tests are used as the only method of identification, because such children perform poorly on group tests.[296]

To date it appears that the vast majority of students with disabilities who also exhibit giftedness have been found among students characterized as "underachievers."[297] These problems in identification indicate the need for a clear definition in law and policy for the term "gifted/learning

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[291] *See generally* Timothy J. Landrum, "Gifted and Learning Disabled Students: Practical Considerations for Teachers," *Academic Therapy*, vol. 24, no. 5 (May 1989), pp. 533–44 (noting that gifted/learning disabled children and their unique problems are ignored all too often in our educational system; they are prevented by school policies and States' guidelines from participating in either gifted or learning disabled programs).

[292] Bredekamp, *The Gifted/Learning Disabled Student*, p. 13. According to prominent developmental psychologist Ellen Winner, because of the perception of giftedness as an "elitist topic," "there are a lot of misconceptions about giftedness." Winner stated that gifted students often are only gifted in one particular area, such as spatial intelligence, or gifted at music, math, language, etc., and some may be gifted in one area and learning disabled in another. She added that the most common combination is a language disability, like dyslexia, combined with an unusual spatial ability. *See* "We Need to be Smarter about Gifted Kids," *The Boston Globe*, Aug. 17, 1996.

[293] Bredekamp, *The Gifted/Learning Disabled Student*, p. 13.

[294] *See generally* Willig and Greenberg, *Bilingualism and Learning Disabilities*; Baca and Cervantes, *The Bilingual Special Education Interface*; Bredekamp, *The Gifted/Learning Disabled Student*.

[295] *See* Fox et al., *Learning Disabled/Gifted Children*, pp. 25–31. *See also* Willig and Greenberg, *Bilingualism and Learning Disabilities*; Baca and Cervantes, *The Bilingual Special Education Interface*.

[296] *See generally* Humphrey, *Helping Learning-Disabled Gifted Children*.

[297] *See* Joanne R. Whitmore and C. June Maker, *Intellectual Giftedness in Disabled Persons* (Rockville, MD: Aspen Publication, 1985) (hereafter cited as Whitmore and Maker, *Intellectual Giftedness in Disabled Persons*) (comparing lists of characteristics for both the underachieving gifted child and the gifted/learning disabled child, and found that the two were identical in nature).

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disabled" and a more consistent interpretation of this definition.[298] Current provisions in the IDEA, its implementing regulations, and the section 504 regulations do not include such a definition. In addition, a review of educational research literature suggests that the most effective strategy for identifying exceptional students is for all educators, particularly those in lower elementary regular classrooms, to have the ability to recognize positive and negative characteristics, as well as strengths and weaknesses, in children, and to associate observations with potential needs and situations.[299] Education researchers have compiled characteristics profiles on gifted students, students who are learning disabled, and students who are gifted and learning disabled.[300] These characteristics profiles have revealed dominant patterns of strengths and weaknesses in gifted children with specific learning disabilities.[301]

Despite the difficulties that abound in identifying and meeting nondisability-related characteristics of students with disabilities, some school districts across the country are developing innovative and successful programs to address these issues. For example, in New Jersey, the Newgrange School has implemented a challenging education program for students who are both gifted and disabled. One asset of the program is that it allows for a 1-to-3 staff-student ratio in crafting individualized programs to meet the specific needs of each student participant. Gifted students can take calculus, discuss advanced literature, do challenging scientific experiments, learn computer programming and make optimum academic progress.[302]

In the 1994–1995 school year, Prince Georges County Public Schools in Maryland began a pilot program to meet the educational needs of gifted and talented students with disabilities. The pilot program seeks to provide special education services within the district's Talented and Gifted (TAG) program while identifying instructional activities that make children successful. At North Forestville Elementary School in Prince Georges County, special education students who are talented and gifted are pulled out of their special education classes to participate in the TAG program. Most of the talented and gifted students come to the school already identified, but the school does have a testing coordinator who helps identify students in the school.[303]

The Charlotte-Mecklenburg, North Carolina, School District seeks to identify giftedness in children with learning disabilities, behavioral and/or emotional disabilities, and limited English proficiency through assessments targeted to these students' special needs.[304] All school districts in the State must establish a pool of students who

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298 Bredekamp, *The Gifted/Learning Disabled Student*, p. 13.

299 *See generally* Humphrey, *Helping Learning-Disabled Gifted Children*; John Feldhusen, Joyce Van Tassel-Baska, and Ken Seeley, *Excellence in Educating the Gifted* (Denver: Love Publishing Company, 1989) (hereafter cited as Feldhusen et al., *Excellence in Educating the Gifted*); Landrum, "Gifted and Learning Disabled Students"; L.K. Silverman, "Invisible Gifts, Invisible Handicaps," *Roeper Review* vol. 12, pp. 37–42; Whitmore and Maker, *Intellectual Giftedness in Disabled Persons*; Fox et al., *Learning Disabled/Gifted Children*; Daniels, *Teaching the Gifted/Learning Disabled*; Bredekamp, *The Gifted/Learning Disabled Student*, pp. 17–21.

300 *See generally* Feldhusen et al., *Excellence in Educating the Gifted*; Silverman, "Invisible Gifts," pp. 37–42; Humphrey, *Helping Learning-Disabled Gifted Children*; A.S. Cordell and T. Cannon, "Gifted Kids Can't Always Spell," *Academic Therapy*, vol. 21, pp. 143–52; Udall in *Intellectual Giftedness in Disabled Persons*; B.W. Moller, "Special Techniques for the Gifted LD Student," *Academic Therapy*, vol. 20, pp. 167–71.

301 Bredekamp, *The Gifted/Learning Disabled Student*, p. 20.

302 *See* "Special Education For the Gifted Disabled," *The New York Times*, Aug. 6, 1993.

303 *See* Robert Coombs, Director of Special Education, Prince Georges County Public Schools, interview in Upper Marlboro, MD, Apr. 11, 1996, p. 4; Prince Georges County Public Schools, *Handbook of Educational Strategies for Gifted Students with Special Learning Needs*, 1995; Prince Georges County Public Schools, "Gifted/Special Learning Needs Program Expansion, June 7, 1995; Verlene Tatum, Principal, North Forestville Elementary School, interview in Prince Georges County, Apr. 19, 1996, p. 2.

are possibly qualified for and in need of a more challenging and rigorous academic program. Charlotte-Mecklenburg School District has procedures in place to ensure that students with disabilities have access to gifted and talented programs. To determine a student with a learning disability's eligibility for the academically gifted program, a school-based committee composed of staff from the academically gifted program and teachers familiar with learning disabilities must review the student's IQ test scores (verbal and nonverbal scores, if a breakdown is possible), any achievement data, as well as grades and anecdotal information from parents and teachers. The committee looks for either linguistic, logical-mathematical, and/or spatial intelligence. The Program for the Gifted Office cautions the school-based committee that the learning disability can mask and suppress giftedness. If the committee reaches consensus that the referred student shows both giftedness and a learning disability and meets State or local guidelines, the child can be placed as an academically gifted or talented student. If the child meets both giftedness and has a diagnosed learning disability, but does not meet State or local guidelines, the committee can recommend the child be placed in the program, as long as the child displays at least one designated strength: linguistic, logical-mathematical, and/or spatial intelligence.[305]

Finally, Seattle, Washington, provides an example of a school district program that has had to redeploy its resources in efforts to address the needs of students with disabilities who are limited English proficient. The Seattle School District's Office of the Superintendent of Public Instruction (OSPI) reported that 10.75 percent of its 1992–1993 enrolled students had disabilities, and assumed about the same percentage of limited-English-proficient students could have disabilities. OSPI stated that there was a dearth of special education teachers who were "culturally or linguistically diverse." Gathering relevant information on acculturation, language proficiency, and sociocultural factors, as well as the use of translators or interpreters for the student and parents are some services OSPI has proposed to improve identification of disabilities among limited-English-proficient students.[306]

Members of Seattle's community with limited English proficiency are cautiously optimistic about the district's plans to bridge the gap between special education services and limited-English-proficient students. The director of El Centro De La Raza explained that many minority parents and community representatives note the improvements in their children's behavior when there is parental participation. However, many sense they are not welcome. He suggested that more direct contact with parents, especially with those who have limited English skills, is necessary.[307]

Elsewhere, State and local special education officials are requesting Federal assistance in their efforts to educate students with disabilities who also are limited English proficient.[308] During a DOEd-sponsored forum on special education held in early 1997, the special education director for the State educational agency of New Mexico implored DOEd to provide specific guidelines to State and local educational agencies on identifying, assessing, and teaching students with dis-

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[304] *See* Anne Udall, Coordinating Director, Curriculum and Academically Gifted Programs, Division of Instructional Services, interview in Charlotte-Mecklenburg, NC, May 8, 1996, p. 4.

[305] *See* North Carolina Department of Public Instruction, Division of Exceptional Children's Services, *Procedures Governing Programs and Services for Children with Special Needs*, 1993; Charlotte-Mecklenburg Schools, *Program for the Gifted Handbook*.

[306] *See* Seattle Public Schools, Special Education Procedures Manual 1995–95 (Draft), Office of Special Education, August 1995; State Plan for the Education of Individuals with Disabilities, State of Washington 1996–1998, pp. 8–9.

[307] Roberto Maestes, Director, El Centro De La Raza, telephone interview, Apr. 12, 1996.

[308] William J. Cahir, "LEP Problems Prompt Call for Uncle Sam's Guidance," *Education Daily*, vol. 30, no 67 (Apr. 8, 1997), p. 1.

abilities who also were limited English proficient.[309] Diego Gallegos protested to DOEd about the lack of effective methods for evaluating limited-English-proficient students in general and requested discretionary funding to conduct assessment research.[310] Another forum attendee, Anthony White, the supervisor of special education programs for the Newark, New Jersey, school district, stated that he was not aware of any information demonstrating effective methods for identification or teaching of students with disabilities who also are limited English proficient.[311] White stated that "[p]eople come and say, 'You're not doing it right, but they don't share a model for doing it.'"[312]

Part of the problem may lie in DOEd's dissemination of regulations and policy guidance addressing the nondisability-related educational needs of students with disabilities to States and local school districts. IDEA and the section 504 regulations, while not comprehensive in providing guidance for identification, assessment, and teaching with respect to specific nondisability-related educational needs such as limited English proficiency, do contain provisions which assist in the identification and assessment of students for their nondisability-related educational needs generally. For example, to promote accurate identification, the IDEA and the section 504 regulation require the use of multiple criteria in evaluation and placement decisionmaking practices. Specifically, the IDEA and the regulations implementing the IDEA and section 504 require that school districts "[i]n interpreting data and in making placement decisions, (1) draw from a variety of sources, including the aptitude and achievement tests, teacher recommendations, physical condition, or social or cultural background, and adaptive behavior . . . (2) establish procedures to ensure that information from all such sources is documented and carefully considered . . . (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child. . ."[313] To ensure access for students with disabilities to programs and services needed to meet their nondisability-related needs, the nondiscrimination provisions of section 504 and the section 504 regulations prohibit school districts from excluding or denying participation to qualified persons with disabilities.[314]

The legal obligations set forth in the IDEA and section 504 regulations, though lacking a definition for "the gifted/learning disabled," do contain provisions offering useful guidance.[315] In addition, OCR's enforcement activities continue to serve a vitally important purpose in ensuring school district compliance with these obligations.[316]

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[309] Ibid.

[310] Ibid.

[311] Ibid., p. 2.

[312] Ibid.

[313] 34 C.F.R. § 104.35(c) (1996).

[314] *See, e.g.*, Baltimore City Public Schools, Case No. 023–86 (State Dep't of Educ. 1986), *reprinted in*, 508 EHLR 127 (concluding that student qualifies for the gifted and talented program on the basis of her I.Q. scores and cannot be excluded from that program because of her disability under section 504 of the Rehabilitation Act).

[315] In part because of Federal legal obligations, State and local school officials seek to address nondisability-related needs of students with disabilities in developing education programs. For example, key concerns among educators seeking to address limited English proficiency in students with disabilities are "1) identification, or sorting out the needs of such students to avoid the problem of their overinclusion in special education and, for those properly included, 2) services, or meeting their linguistic-cultural needs in coordination with their special education needs." *See* Perry A. Zirkel, "Commentary: 'SPED/LEP': Special Education for Limited English Proficient Students," *Education Law Reporter*, p. 181 (vol. 69, Oct. 10, 1991).

[316] For example, OCR has found that the Los Angeles County Office of Education discriminated against disabled students for not providing adequate testing and academic programs for the disabled. OCR concluded that disabled students received less

Although these provisions help to ensure that nondisability-related needs of disabled students are distinguished from disability-related ones and that programs and services are accessible, the IDEA, section 504, and their implementing regulations are unclear on school district obligations to meet nondisability-related exceptional needs. Neither the IDEA, nor section 504, nor their implementing regulations, address the issue of educating students with disabilities who also have nondisability-related exceptional needs. Because provisions of the IDEA and section 504 apply by the fact that a person has a disability,[317] a student is not entitled to a free appropriate public education under the IDEA or section 504 solely because of his or her nondisability-related needs.[318] Thus, it is clear that the requirements for a free appropriate public education do not apply solely because a student is gifted or limited English proficient or because the student has other educational needs unrelated to a disability.

The IDEA is clearer than section 504 in addressing whether schools have an obligation to meet the nondisability-related exceptional needs. Because the IDEA limits the definition of a free appropriate public education to mean only "special education and related services,"[319] the requirements of the IDEA apply only to the extent that a student has disability-related needs requiring special education and related services. The section 504 regulations define a free appropriate public education as the provision of regular and special education and related aids and services.[320] It does not necessarily limit schools' obligations in providing a free appropriate public education to addressing only the student's disability-related needs. The regulations state that schools must provide an education to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met.[321] They make no distinction between disability- or nondisability-related needs. Consequently, the regulation can be interpreted to ensure that schools meet all the individual needs of the student, including his or her nondisability-related needs. Because of the lack of

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help in their native language than students who were not disabled. For example, Federal investigators reported that children who could not speak English at all were classified as fluent English speakers, regardless of the language used in a the student's home. Investigators also concluded that county schools had lower standards for determining when a disabled student had become fluent in English. *See* "Inquiry Finds Disabled Get Less Bilingual Instruction," *Los Angeles Times*, Aug. 15, 1993.

[317] *See* 34 C.F.R. § 300.121 (1996) ("Each State plan must include information that shows that the State has in effect a policy that ensures that *all children with disabilities* have the right to [a free appropriate public education]. . .") (emphasis added); 34 C.F.R. § 104.33(a) (1996) ("A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each *qualified handicapped person* who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.") (emphasis added). The IDEA covers children with disabilities "[w]ho, for that reason, need special education and related services." 34 C.F.R. § 300.7(a)(1), (a)(2)(ii) (1996). Section 504 does not specify that a person with a disability must need special education and related services to be covered. *See* 34 C.F.R. § 104.3(j) (1996).

[318] *See* Student Roe v. Commonwealth of Pa., 638 F. Supp. 929 (E.D. Pa. 1986), *reprinted in*, 1986–87 EHLR DEC. 558:119 (EHA applies only to children with disabilities, therefore, the extent to which a State chooses to apply EHA procedural protections to gifted students is solely a matter of State law).

[319] *See* 34 C.F.R. § 300.8 (1996) ("As used in this part, the term 'free appropriate public education' means special education and related services that (a) are provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the SEA, including the requirements of this part; (c) including preschool, elementary school, or secondary school education in the State involved; and (d) are provided in conformity with an IEP that meets the requirements of §§ 300.340–300.350.").

[320] *See* 34 C.F.R. § 104.33(b) (1996) ("For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36").

[321] *Id.*

clarity on this issue, both the IDEA and section 504 could benefit from modification or policy guidance to ensure that school districts, students with disabilities, and their parents have a better understanding of IDEA and section 504 compliance requirements.

OCR's Enforcement Efforts

As mentioned above, the section 504 regulations do not address the issue of educating students with disabilities who also have nondisability-related needs. In addition, OCR has not produced policy specifically addressing this topic. However, the regulations can be interpreted to require that schools, in providing an appropriate education to students with disabilities, address the disability-related and nondisability-related needs of the student. When a school develops an educational program or IEP for a student it is unclear whether the program or IEP should include elements to address nondisability-related needs such as regular education needs, giftedness, and limited proficiency in English.

Based on a review of OCR case letters, OCR appears to require schools to address a student's limited-English-proficient needs when developing an individualized education for a student who also has a disability.[322] OCR's approach is understandable given the effect limited English proficiency may have on a student's ability to comprehend the instructional services needed to address the disability. Because a student may not be able to benefit from special educational services unless he or she can understand the instruction provided, the need for incorporating language assistance services into an IEP is evident.

For students who have disabilities and who also are gifted, OCR has approached the cases as an "access" issue. OCR has not found that school districts, in providing a free appropriate public education, must address the students' gifted needs, and it has not treated the denial of a student to gifted programs or services as a violation of the FAPE provisions of the regulations.[323] Instead, OCR has focused on the criteria for admission to gifted programs and determined whether they are discriminatory under the general nondiscrimination provision at section 104.4. Although OCR's approaches to these issues are clear on reviewing its practices, the lack of clarity in regulations and policy make OCR's approaches less obvious to school districts seeking to comply with section 504 and to students and parents affected by these issues.

Students with Disabilities and Limited Proficiency in English

OCR has recognized that there are many civil rights considerations involved in educating students who have both a disability and limited proficiency in English, and it has approached this topic as raising both section 504 and Title VI issues.[324] It has produced some policy and other information on the placement of limited-English-proficient students in special education classes,[325] although these materials discuss the issue in the context of Title VI requirements and policy.[326] In OCR's 1991 "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency," it recognized that policy guidance would be helpful on the relationship between section 504 and Title VI when placing limited-English-proficient students in special education programs.[327] Although the policy memorandum also specified that OCR would prepare a separate policy update on this issue,[328] OCR has not yet produced the policy update.[329] In recent years, however, OCR has made available to its staff certain technical assistance materials that directly address the issue of limited-English-proficient students who have disabilities.[330]

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[322] In some cases, OCR has considered services to address a student's limited proficiency in English as a "related service" that must be provided as part of an appropriate education under section 504. *See* Stanley Seidenfeld, Director, Office for Civil Rights, Region II, U.S. Department of Education, letter to Mr. Frank Mauro, Superintendent of Schools, Brentwood Union Free School District, Brentwood, New York, re: Compliance Review No. 83–5006 ESE, Dec. 31, 1985, 311 EHLR 50, 51 (hereafter cited as OCR, Compliance Review No. 83–5006 ESE, 311 EHLR 50) (Absence of any evaluative data in their special education files documenting that these children do not need language services as a related service is a violation of the section 504 regulation, 34 C.F.R. § 104.33(b).).

[323] *See* 34 C.F.R. §§ 104.33 (a) (1996) (stating "[a] recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.").

[324] Cases involving students who have both a disability and limited English proficiency raise section 504 issues because there may be disability-related educational needs that must be met for a student to have an appropriate education. These cases also involve Title VI issues because, under OCR policy later affirmed by judicial interpretation, schools must take affirmative steps to address a student's inability to speak and understand English when such students are members of a national origin minority group. *See* J. Stanley Pottinger, Director, OCR, U.S. Department of Health, Education, and Welfare, memorandum to School Districts With More Than Five Percent National Origin-Minority Group Children, "Identification of Discrimination and Denial of Services on the Basis of National Origin," May 25, 1970, pp. 1–2, *reprinted in* 35 Fed. Reg. 11,595 (1970)

Evaluation Practices for Determining that the Student Has a Disability

Although the section 504 regulations do not specifically address the issue of students who have limited proficiency in English, the regulations do have provisions applicable to the special education assessment of these students. One provision specifies that tests be "selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level . . . rather than reflecting the student's

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(hereafter cited as Pottinger 1970 LEP policy memorandum); Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974).

[325] *See* Michael L. Williams, Assistant Secretary for Civil Rights, memorandum to OCR Senior Staff, "Policy Update on Schools' Obligations Toward National Origin Minority Students With Limited-English Proficiency (LEP students)", Sept. 27, 1991 (hereafter cited as Williams, 1991 LEP policy memorandum); Pottinger 1970 LEP policy memorandum; OCR, DOEd, The Provision of an Equal Education Opportunity to Limited English Proficient Students (pamphlet). *See also* OCR, DOEd, "Section 555—Treatment of Limited English Proficient Students with Disabilities," *Section 504 and the Americans with Disabilities Act (ADA) Title II Manual*, pp. 1–2 (hereafter cited as OCR, "Section 555—Treatment of LEP with Disabilities") (listing these and other materials).

[326] For example, the May 25, 1970, memorandum on "Identification of Discrimination and Denial of Services on the Basis of National Origin" notes that its purpose is "to clarify D/HEW policy on issues concerning the responsibility of school districts to provide equal educational opportunity to national-origin minority group children deficient in English language skills." The policy presents "some of the major areas of concern that related to compliance with Title VI;" it does not mention section 504. Pottinger 1970 LEP policy memorandum, pp. 1–2. The Sept. 27, 1991, memorandum on "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP students)" notes that it "is primarily designed for use in conducting *Lau* compliance reviews—that is compliance reviews designed to determine whether schools are complying with their obligation under the regulation implementing Title VI of the Civil Rights Act of 1964." The memorandum does note that, in conducting investigations on the assignment of students with limited proficiency in English to special education programs, "[t]he additional legal requirements imposed by Section 504 also must be considered." However, the memorandum specifies it "does not purport to address the numerous Title VI and Section 504 issues related to the placement of limited English-proficient students in special education programs." Williams, 1991 LEP policy memorandum, p. 7.

[327] Williams, 1991 LEP policy memorandum, p. 7.

[328] Ibid.

[329] OCR's Regional Office for Region VII recently has produced a self-assessment guide on special education and limited-English-proficient students. *See* OCR, Region VII, DOEd, *Special Education and Limited-English-Proficient Students Self-Assessment Guide*, 1996.

[330] *See* Paula Olson, *ERIC Digest: Referring Language Minority Students to Special Education* (Washington, DC: ERIC Clearinghouse on Languages and Linguistics) (as retrieved from OCR's electronic library) (file name: HQ960407.tap); Jorge A. Maldonado, "Bilingual Special Education: Specific Learning Disabilities in Language and Reading," *The Journal of Educational Issues of Language Minority Students*, vol. 14 (Winter 1994), pp. 127-48 (as retrieved from OCR's electronic library) (file name: HQ960411.tap); Leonard M. Baca and Hermes T. Cervantes, *ERIC Digest No. E496: Bilingual Special Education* (Reston, VA: Council for Exceptional Children, ERIC Clearinghouse on Handicapped and Gifted Children) (as retrieved from OCR's electronic library) (file name: HQ960408.tap). *See also* OCR, "Section 555—Treatment of LEP with Disabilities" (listing these and other materials).

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impaired sensory, manual, or speaking skills. . . ."[331] Another specifies that the social and cultural background of a student must be taken into account in the assessment of educational needs.[332] From these provisions, OCR has interpreted the section 504 regulation to require school districts, when assessing students for possible special education or related services, to take into account the English language proficiency of students whose primary home language is other than English.[333] In its case letters OCR has clarified that if, in the background of a student who has limited proficiency in English, the student's primary or home language has a major impact upon his or her education, then the effect of that language, including the student's English language proficiency, must be considered when placing the LEP student in regular and/or special education programs.[334]

In clarifying the requirement to account for a student's English language proficiency, OCR has noted steps that school districts should take to ensure compliance with the section 504 regulations. According to OCR, when assessing a student whose primary home language is other than English for a suspected disability, the district should first assess the student for her or his language proficiency, using objective instruments designed for such students.[335] The student should subsequently be assessed for special education with instruments requiring only those language skills in which the student is known objectively to be proficient.[336] OCR has explained that, if a student is not proficient in the language skills required to complete an assessment instrument, the test results may not be valid.[337] Reliance on invalid test data for the evaluation and placement of students who have limited English proficiency would violate the section 504 regulations.[338]

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[331] 34 C.F.R. § 104.35(b)(3) (1996).

[332] 34 C.F.R. § 104.35(c)(1) (1996). According to OCR, this requirement "necessarily includes language use and proficiency." Kenneth A. Mines, Regional Director, Office for Civil Rights, Region V, U.S. Department of Education, letter to Dr. Manford Byrd, Jr., General Superintendent, Chicago, Illinois, re: Complaint No. 05–88–1080, Feb. 6, 1989, 353 EHLR 214, 215 (hereafter cited as OCR, Complaint No. 05–88–1080, 353 EHLR 214).

[333] *See* Lillian Guitierrez, Acting Regional Director, OCR, Region VIII, DOEd, letter to Neil Henderson, Director, San Luis Valley Board of Cooperative Services, Alamosa, CO, re: Complaint No. 08–93–5021, Mar. 8, 1994, 21 IDELR 304, 306 (hereafter cited as OCR, Complaint No. 08–93–5021, 21 IDELR 304); John E. Palomino, Regional Civil Rights Director, OCR, Region IX, DOEd, letter to Maurice Ross, Superintendent, Tustin Unified School District, Tustin, CA, re: Complaint No. 09–90–1079, May 31, 1990, 16 EHLR 1335, 1336; OCR, Complaint No. 09–87–5402, 16 EHLR 194, 197; Robert L. Brown, Director, OCR, Region IX, DOEd, letter to Francis M. Hatanaka, Superintendent of Education, Hawaii State Department of Education, Honolulu, Hawaii, Sept. 17, 1985, 311 EHLR 52, 66 (hereafter cited as OCR 1985 Case, Hawaii State Department of Education, 311 EHLR 52). *See also* Lillian Guitierrez, Acting Regional Director, OCR, Region VIII, DOEd, letter to James L. West, Superintendent, Ogden City School District, Ogden, UT, re: Complaint No. 08–94–5002, Mar. 23, 1994, 21 IDELR 387, 393 (hereafter cited as OCR, Complaint No. 08–94–5002, 21 IDELR 387); Lillian Guitierrez, Acting Regional Director, OCR, Region VIII, DOEd, letter to David Salazar, Superintendent, West Las Vegas School District, Las Vegas, NM, re: Complaint No. 08–93–1142, Nov. 30, 1993, 20 IDELR 1409, 1409–11 (hereafter cited as OCR, Complaint No. 08–93–1142, 20 IDELR 1409).

[334] *See* John E. Palomino, Regional Civil Rights Director, OCR, Region IX, DOEd, letter to Ramon Cortines, Superintendent, San Francisco Unified School District, San Francisco, CA, re: Complaint No. 09–87–5402, Sept. 15, 1989, 16 EHLR 194, 196 (hereafter cited as OCR, Complaint No. 09–87–5402, 16 EHLR 194); OCR, Region IX, DOEd, letter to Robert C. Lee, Superintendent, Moreno Valley Unified School District, Moreno Valley, CA, re: Complaint No. 09–88–5016, June 30, 1989, 353 EHLR 255, 258 (hereafter cited as OCR, Complaint No. 09–88–5016, 353 EHLR 255).

[335] OCR, Complaint No. 08–93–1142, 20 IDELR 1409, 1411. In this case, OCR found that the students' English language proficiency was either not assessed or assessed inadequately using subjective criteria, prior to their special education evaluations. In interviewing the school district's certified educational diagnostician, OCR learned that the diagnostician sometimes determines the appropriate language for testing, but he only does so informally or subjectively, by interviewing the students and identifying the language the student prefers to use or is more comfortable using. The diagnostician added that he has never received objective language-proficiency data, such as results from the Bilingual Inventory of Natural Language (BINL). OCR examined the records of the students in question. Records of the diagnostic evaluations for the students did not indicate that the student's English language proficiency was a concern to the diagnostician. Reports for the students were inconsistent in recording the primary home language of the students. For one student, the first report noted the student's home language was English; a subsequent report for that student recorded the home language as Spanish. None of the reports for the students mentioned the Home Bilingual Usage Estimate, results from the BINL, or any other record of an objective assessment of his English proficiency. Ibid., pp. 1411–12.

In a 1993 case letter, OCR provides the following illustration: a student whose primary home language is other than English (PHLOTE) and who is verbally proficient but not proficient in reading and writing skills should not be tested with instruments that require reading or writing in English. If the student is not sufficiently proficient in any language, then the district might consider using assessment instruments in a variety of languages, in combination with nonverbal instruments, to ensure that persons knowledgeable about the meaning of the test results and familiar with the student have sufficient information on which to base a reliable diagnosis.[339]

OCR has recognized that "in order to account for the effect of language on test results, the staff at some school districts consider students' 'dominant language' or 'primary language.'"[340] OCR cautions that "determining that a student is dominant in English is not equivalent to determining that the student is proficient in the language skills required to produce valid, reliable results on an assessment instrument."[341] In clarifying the distinction between language proficiency and language dominance, OCR notes:

> A student's language proficiency should not be confused with his language dominance. A person whose dominant language is English is not necessarily proficient in English. Language dominance is simply a relative measure of two or more languages spoken by an individual, indicating the one language that the individual uses most commonly, productively, and comfortably. Language proficiency, on the other hand, is a measure of how well an individual can speak, read, write, and comprehend a language relative to the individual's peers.[342]

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[336] OCR, Complaint No. 08–93–1142, 20 IDELR 1409, 1411.

[337] *See* Lillian Guitierrez, Acting Regional Director, OCR, Region VIII, DOEd, letter to James L. West, Superintendent, Ogden City School District, Ogden, UT, re: Complaint No. 08–94–5002, Mar. 23, 1994, 21 IDELR 387, 393; Lillian Guitierrez, Acting Regional Director, OCR, Region VIII, DOEd, letter to Neil Henderson, Director, San Luis Valley Board of Cooperative Services, Alamosa, CO, re: Complaint No. 08–93–5021, Mar. 8, 1994, 21 IDELR 304, 306. *See also* Robert L. Brown, Director, OCR, Region IX, DOEd, compliance review of Dysart, AZ, Unified School District #89, letter to William L. Jones, Superintendent of Schools, Dysart Unified School District, Peoria, AZ, Oct. 6, 1983, 311 EHLR 32, 38 (OCR has found "serious problems," for example, when a school district has used tests to determine progress and future goals and objectives for special education students that have not been normed on non- or limited-English-proficient students, and when the tests have not been translated into languages other than English).

[338] *See* OCR, Complaint No. 08–94–5002, 21 IDELR 387, 393; Lillian Guitierrez, Acting Regional Director, OCR, Region VIII, DOEd, letter to Neil Henderson, Director, San Luis Valley Board of Cooperative Services, Alamosa, CO, re: Complaint No. 08–93–5021, Mar. 8, 1994, 21 IDELR 304, 306 (hereafter cited as OCR, Complaint No. 08–93–5021, 21 IDELR 304).

[339] OCR, Complaint No. 08–93–1142, 20 IDELR 1409, 1411.

[340] OCR, Complaint No. 08–94–5002, 21 IDELR 387, 393. For example, in one case, a school system used a computer program, known as the Expert System, to estimate the certainty of disability classifications. From data entered, the computer program calculated the "certainty factors" reflecting the likelihood of cultural impact on assessment results and the discrepancy in test results indicative of a particular special education classification. OCR analyzed some of the questions asked by the Expert System and determined that the computer program generated an estimate of the effect of language on test performance based on language dominance, rather than proficiency. OCR concluded that reliance on the Expert System to estimate the effect of language on test results would not ensure that test results were valid and reliable for students having limited proficiency in English and who were referred for special education evaluations. Ibid.

[341] OCR, Complaint No. 08–94–5002, 21 IDELR 387, 393; OCR, Complaint No. 08–93–5021, 21 IDELR 304, 306.

[342] OCR, Complaint No. 08–93–1142, 20 IDELR 1409, 1411; OCR, Complaint No. 08–94–5002, 21 IDELR 387, 393.

Therefore, OCR emphasizes that "[a] person whose dominant or primary language is English is not necessarily proficient in English."[343]

In determining whether school district staff account for the effect of language development and proficiency of students, OCR has considered several factors. In conducting their investigations or reviews, OCR has considered whether the school district has written procedures specific to the special education assessment of students having limited English proficiency.[344] When a district has no written procedures, OCR has conducted interviews with the district's psychologists and other evaluating staff to determine the procedures for special education assessment of students having limited proficiency in English. OCR then has considered whether the school district followed those procedures in practice, by conducting interviews with staff and reviewing students' files.[345] OCR has considered whether there is evidence that a school district inquired into the language proficiency of the student in a special education evaluation.[346] For example, OCR has examined the school district's procedures or handbooks to determine whether the English language abilities of students who have limited English proficiency are considered for referral and placement in special education.[347]

OCR has reviewed student files to determine whether students having limited proficiency in English were routinely assessed for special education in their primary language, whether the need for a bilingual evaluation had been determined, whether a bilingual staff member participated in IEP meetings to address the need, if any, for language support services in order for the student to succeed in his/her educational program.[348] OCR also has considered whether the district had trained personnel for assessing the students.[349]

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[343] OCR, Complaint No. 08–94–5002, 21 IDELR 387, 393; OCR, Complaint No. 08–93–5021, 21 IDELR 304, 306.

[344] *See* OCR 1985 Case, Hawaii State Department of Education, 311 EHLR 52, 65 (OCR considered whether the school district had written criteria or procedures by which staff could ascertain when students having limited English proficiency, referred for or receiving special education, required bilingual assessment by trained bilingual personnel to evaluate accurately the special education needs.); OCR, Region IX, DOEd, compliance review of Coachella Valley, CA Unified School District, letter to Bob Elrod, Superintendent, Coachella Valley Unified School District, Thermal, CA, re: Docket No. 09–84–5004, May 14, 1985, 311 EHLR 42, 49 (hereafter cited as OCR, Docket No. 09–84–5004, May 14, 1985, 311 EHLR 42).

[345] *See* OCR, Docket No. 09–84–5004, May 14, 1985, 311 EHLR 42, 49.

[346] In one case, OCR analyzed 118 randomly selected pupil cumulative folders of students in special education programs. OCR found that 61 percent of the folders did not indicate the primary or home language of the pupil. OCR concluded that the school district, therefore, had violated the section 504 regulation (then section 84.35, now 104.35) by not providing a preplacement inquiry on the initial referral form in order to provide the service necessary to evaluate, identify, and place students who have limited proficiency in English. OCR noted, "Omitting this kind of inquiry precludes the proper placement, identification and evaluation." OCR, DOEd, letter to Superintendent, Rochester School District, Rochester, NY, Jan. 29, 1980, 311 EHLR 09, 10. In another case, OCR found that the school district's special education referral form included a space to indicate the student's "primary language," that the school district's IEP form included a space to indicate the "language dominance" of the student, and that the school psychologist relied on the information included on the referral form to determine whether the student should be tested in English or another language. However, in reviewing the records of four students with disabilities who were limited English proficient, OCR found that the referral forms of two students did not include information on primary language and that no record indicated whether any of the four students were tested objectively for English-language proficiency prior to special education testing. OCR, Complaint No. 08–93–5021, 21 IDELR 304, 306. *See also* OCR 1985 Case, Hawaii State Department of Education, 311 EHLR 52, 65.

[347] *See* OCR, Complaint No. 08–94–5002, 21 IDELR 387, 394 ("OCR found that the special education manual, if fully implemented, is sufficient to ensure compliance with the matter of this portion of the review."); OCR, Complaint No. 08–93–5021, 21 IDELR 304, 306.

[348] OCR, Complaint No. 09–87–5402, 16 EHLR 194, 196.

[349] *See* OCR, Docket No. 09–84–5004, May 14, 1985, 311 EHLR 42, 49 (OCR conducted a compliance in one school district where 45 percent of the student population was limited English proficient during the 1983–1984 school year. It found that during

Finally, OCR also has reviewed actual assessment instruments used for evaluations.[350] It has reviewed information on education validation studies for a particular test to determine whether the test was designed in a way to be appropriate for use by students having limited proficiency in English.[351] It also has conducted interviews with staff administering and evaluating the tests, and it has reviewed test evaluation reports to determine (1) whether tests were administered in each student's primary language, and (2) whether there were any concerns about the validity of the test results because of the students' English language proficiency.[352] For example, in one case, OCR found that the psychological evaluation reports contained no documented evidence that the students were administered the WISC–R test in their primary language, and only one documented example of part of an unspecified test being translated into the student's primary language. OCR found that the psychological evaluations of three of the students included the psychologist's concern that the test results may have been affected by the students' ability to communicate in the language of the test and that, despite this concern, there was no evidence that the IEP staffing committee questioned the validity of the testing data.

Services for Students with Disabilities and Limited Proficiency in English

OCR emphasizes that the requirement to provide a free appropriate public education extends to students with disabilities who also have limited proficiency in English. Consequently, "[t]he education for these pupils may consist of regular or special education and may include related aids and services, *but in each case, the effect of their primary language on their [disability] and on their need for language support services must be considered in the IEP process.*"[353] This means that, in determining what services are necessary to educate students with disabilities who have limited proficiency in English, school districts should consider whether the special education and related services must be provided bilingually, in a student's dominant language, or with some other form of English language assistance.[354]

For example, in one case, a complainant alleged that Spanish-speaking students were not provided speech/language therapy in a manner consistent with their limited English-language

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this period, neither of the two district psychologists was fluent in Spanish and that, in reviewing 18 IEPs, there were no situations where the district used a bilingual psychologist even though at least 11 of the IEPs reflected a primary or home language of Spanish. Further, in conducting interviews with district staff, OCR found that the consensus of opinion was that there were few limited- or non-English-proficient students in special education because of the absence of qualified assessors.).

[350] *See* OCR, Complaint No. 08–94–5002, 21 IDELR 387, 394 (OCR analyzed some of the questions asked by the Expert System and determined that the program "generates an estimate of the effect of language on test performance based on language dominance, rather than language proficiency. . . Reliance on the Expert System to estimate the effect of language on test results will not ensure that test results are valid and reliable for language minority students.").

[351] *See* OCR, Region V, DOEd, letter to Richard Wiggall, Superintendent, Elgin School District U–46, Elgin, IL, re: Complaint No. 05–83–1116, July 31, 1985, 352 EHLR 131, 140 (The school district relied on the *Columbia Mental Maturity Scale* to screen students having limited proficiency in English and who were candidates for the Developmental First Grade (DFG) program. The DFG program was a year-long self-contained program offering eligible students the benefits of instruction in a small class by an LD teacher in a diagnostic situation. OCR reviewed information found in the *Eighth Mental Measurements Yearbook* on the *Columbia* test. The yearbook noted that the *Columbia* test is appropriate for use with children ages 3–6; it can be administered in Spanish; it is particularly suitable for children with motor disorders, speech impairments and for those with little or no background in English; it is considered to be reasonably useful for culturally disadvantaged children; and it is also viewed as an effective screening or diagnostic test if used in conjunction with other tests.).

[352] OCR, Complaint No. 08–93–5021, 21 IDELR 304, 306.

[353] Robert L. Brown, Director, OCR, Region IX, DOEd, letter to Francis M. Hatanaka, Superintendent of Education, Hawaii State Department of Education, Honolulu, HI, Sept. 17, 1985, 311 EHLR 52, 66 (emphasis added).

[354] *See* OCR, Complaint No. 05–88–1080, 353 EHLR 214, 215–16; OCR, Complaint No. 09–88–5016, 353 EHLR 255, 258.

proficiency. In conducting its complaint investigation, OCR found that the school district's written procedures on the evaluation and placement of limited-English-proficient students who may require speech and language services, did not require the evaluating pathologist and multidisciplinary staff conference participants to specifically consider whether a student's educational needs require services to be provided by a pathologist fluent in the student's primary language. OCR also found that the staff's failure to consider this issue was reflected in the student records. OCR noted that a State level appeal officer and the American Speech Hearing Association (ASHA), a national professional organization of speech and hearing pathologists, "found a critical component of the evaluation and placement process to be the determination of whether a bilingual pathologist is necessary to provide effective speech and language services to a student not fluent in English." For this and other reasons, OCR concluded that the school district failed to comply with 34 C.F.R. § 104.33 and 104.35.[355]

In addition to considering what language a student's special education must be provided, school districts also should determine whether the student needs language assistance services as part of the IEP or individualized education to address that student's limited English proficiency.[356] If it is determined that the student needs language assistance or support services, the services must be provided to the student in conjunction with the special education and other related services deemed necessary for that student's educational needs.[357]

OCR has found that in at least two cases the school districts failed to comply with the section 504 regulations because language support services for students having limited proficiency in English were terminated once the students were placed in special education programs. In each of these cases, there was either no evidence that students no longer required services related to their limited- or non-English proficiency, or there was no information in their IEPs on educational goals and objectives to address the students' limited proficiency in English.[358]

In at least one case, OCR also considered the quality of the language support services provided to students who were in special education programs and had limited proficiency in English. The school district provided for "consult" services, which occurred at the option and initiation of a special education teacher, who could request suggestions from qualified language-assistance program staff about the individual support services needed by the student. OCR noted that the majority of special education teachers did not have sufficient training in second language acquisition instruction techniques to provide the language support services to the students. During negotiations between OCR and the district, it was therefore determined that "consult," as it had been used, was not a valid language support service except in special circumstances, and that, in most cases, it was not appropriate for special education teachers to be the primary provider of language support instructional services.[359]

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[355] OCR, Complaint No. 05-88-1080, 353 EHLR 214, 215-16.

[356] *See* OCR, Compliance Review No. 83-5006 ESE, 311 EHLR 50, 51 (finding an absence of any evaluative data in their special education files documenting that these children do not need language services as a related service is a violation of the section 504 regulation, 34 C.F.R. § 104.33(b)).

[357] *See id.* at 67.

[358] OCR, Compliance Review No. 83-5006 ESE, 311 EHLR 50, 51; OCR 1985 Case, Hawaii State Department of Education, 311 52, 67 (In this case, OCR found that there was no written policy or procedure prohibiting language support services for students with disabilities who also had limited proficiency in English. However, the district's special education staff and district administrators stated that there was a practice of "no double services" such that students were not entitled to receive services from both special education staff and language support services staff.).

[359] OCR 1985 Case, Hawaii State Department of Education, Honolulu, 311 EHLR 52, 67.

Students with Disabilities Who Are Gifted

Some education researchers have tried to raise greater awareness of the issues associated with educating students with disabilities who also are gifted. Their main concerns have been that (1) a school may fail to identify a student for needed special education, related services, or other accommodations because of the student's giftedness, or (2) a school may fail to recognize the student's giftedness because of focus on the student's disability. In both cases, the end result may be a failure of a student's educational program to meet his or her unique needs.[360] This topic is one on which OCR has produced no policy updates, policy guidance, or technical assistance and education materials. OCR has developed such materials on access to gifted and talented programs. For example, it has produced a number of policies and resources on access to gifted and talented programs under Title VI and, to a lesser extent, Title IX,[361] but these materials do not discuss section 504.

The section 504 requirements are unclear. For example, it is questionable whether the FAPE requirements of the section 504 regulations encompass a student's giftedness. The section 504 regulations require schools to provide students with disabilities an appropriate education—one that is designed to meet the student's individual educational needs as adequately as the needs of students without disabilities are met.[362] It is unclear whether schools must consider all of the educational needs of the student when providing the individualized education, including his or her giftedness, or only those relating to the student's disability requiring special education, related services, supplementary services, or other accommodations.[363]

Many of the cases that OCR has investigated involving students who are both gifted and disabled have alleged discrimination in access to gifted and talented programs rather than a violation of the FAPE provisions.[364] Usually, complaints of access to gifted programs have involved students with learning disabilities who have to achieve at the level that the school district has set as a threshold, for example, where a school district has required all A's and B's, for placement into a program. In those types of cases where the grade threshold is the eligibility requirement, OCR generally would not consider a grade requirement an appropriate standard for eligibility. If students are otherwise gifted, the grades they have achieved may be more a reflection of their disability rather than their ability to be appropriately served in the gifted program.[365]

In cases that have alleged discrimination on the basis of a disability in access to a gifted and talented program, OCR investigators have identified what kind of qualifications are required by the school district for the gifted program, and whether the school district would have to substantially change the nature of the program to accommodate the student with a disability.[366] In keeping with the placement guidelines in the section 504 regulations,[367] OCR has relied on the position that multiple criteria are the most educationally sound and least discriminatory means of placing students in gifted programs.[368] When OCR has reviewed qualification requirements for a gifted and talented program, it has considered factors, such as (1) whether the school district's application process categorically bars students with disabilities from admission to gifted and talent programs,[369] (2) whether I.Q. tests are given or required for eligibility[370] as the sole or predominant criteria for admission,[371] and (3) whether the disabilities of applicants are made known and considered when the school district determines eligibility for the program.[372]

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[360] *See* pp. 209–14 above.

[361] *See* Susan Bowers, Acting Director, Policy, Enforcement, and Program Service, memorandum to OCR Senior Staff, "Promising Programs and Practices to Enhance Access for Women and Minorities to Mathematics and Science Programs and Gifted and Talented Education Programs," Apr. 15, 1996; Williams, 1991 LEP policy, p. 8; Michael L. Williams, Assistant Secretary for Civil Rights, memorandum to Gary D. Jackson, Regional Civil Rights Director, Region X, "Request for Policy Guidance—*Seattle School District*, OCR Case No. 10–85–1063," Dec. 6, 1989; OCR, Region IV, DOEd, *Model Investigative Plan Title VI—Gifted and Talented Programs*; OCR, Region VI, DOEd, *Gifted and Talented Investigative Plan*.

[362] *See* 34 C.F.R. § 104.33(b)(1) (1996).

[363] Section 504 does not require schools to devise an individualized plan that addresses the gifted needs of the student as well his or her disability-related needs. The gifted needs of a student with a disability are treated just as the needs of a student without a disability.

[364] *See* OCR, Region I, DOEd, letter to Eileen Gress, Superintendent, Darien Board of Education, Darien, CT, re: Complaint Nos. 01-95-1039, 01–95–1084, and 01–95–1096, Apr. 13, 1995, 22 IDELR 900 (hereafter cited as OCR Complaint Nos. 01–95–1039, 01–95–1084, 01–95–1096, 22 IDELR 900); Harry A. Orris for Linda A. McGovern, Acting Regional Director, OCR, Region V, DOEd, letter to Foster B. Gibbs, Superintendent, School District of the City of Saginaw, Saginaw, MI, re: Complaint No. 15–87–1067, Oct. 1, 1987, 352 EHLR 536 (hereafter cited as OCR, Complaint No. 15–87–1067, 352 EHLR 536).

[365] *See* Das interview, p. 8.

In at least one case, OCR also has considered whether the school district screened applicants to determine whether they had disabilities. OCR also considered whether the district made known to parents and district staff its practice of considering a disability in determining eligibility for the program.[373] In that case, OCR concluded that the school district's failure to determine whether applicants had disabilities and make known its practices of considering a disability were inconsistent with the section 504 regulation.[374] To resolve the matter, OCR secured an agreement from the school district that it would amend the application form to allow parents and staff an opportunity to note any special factors that should be considered in reviewing the applicant's eligibility. In addition, the school agreed that, for applicants with disabilities, the home school would be instructed to include a student's current IEP with the application.[375]

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[366] *See* ibid.

[367] *See* 34 C.F.R. § 104.35(c)(1) (1996) ("In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations physical condition, social or cultural background, and adaptive behavior. . . .").

[368] Barbara Shannon, Chief Regional Attorney, Atlanta Enforcement Office, Region IV, OCR, DOEd, telephone interview, June 3, 1996, p. 5 (stating that "OCR supports the use of multiple criteria for student placement. Multiple criteria are more advantageous for students and it makes for sound educational policy. OCR has been instrumental in changing State rules that used to rely on IQ tests only for giftedness. IQ tests and achievement tests do not accurately measure giftedness. Multiple criteria are educationally sound according to a variety of education studies. Giftedness cannot be measured by a single test given on a single day.").

[369] *See* OCR, Complaint No. 15–87–1067, 352 EHLR 536, 537.

[370] *See* OCR, Complaint Nos. 01–95–1039, 01–95–1084, 01–95–1096, 22 IDELR 900, 901.

[371] *See* 34 C.F.R. § 104.35(b)(2) (1996) (Recipients shall establish procedures for the evaluation and placement of students with disabilities which ensure that "[t]ests and other evaluation materials include those tailored to assess specific areas of educational needs and not merely those which are designed to provide a single general intelligence quotient."); 34 C.F.R. § 104.35(c)(1) (1996) (In making placement decisions, the recipient shall draw upon information from a variety of sources.).

[372] *See* OCR, Complaint No. 15–87–1067, 352 EHLR 536, 537 (In this case, OCR's investigation disclosed that when students with disabilities applied to the gifted and talented program (known as CAS) and the students' disabilities were made known to the CAS, their disabilities were considered in determining eligibility for admission. OCR also found that district practice required that the IEP committee affirm placement in CAS as being consistent with the student's educational needs and abilities.).

[373] *Id.* (OCR found that the school district did not routinely screen applicants to the gifted and talented program to determine whether they had a disability and to consider the applicants' needs and abilities in making admissions decisions. Further, OCR found that the practice of considering the applicant's disability and involving an IEP committee as the primary means of entering the program was not generally known to parents and district staff.).

[374] *Id.* at 537–38.

Reevaluating Students Periodically

Educational Perspectives and Policy on Reevaluation

Reevaluation refers to the process undertaken by schools to determine whether a student's placement or plan for services requires revision. The practice of reevaluating students with disabilities is required under both section 504 and the IDEA. The section 504 regulations require that recipients of Federal funds conduct reevaluations before implementing an initial regular or special education placement or "any subsequent significant change in placement."[376] They also require recipients to conduct reevaluations periodically.[377] The IDEA regulations require that children be reevaluated "every three years or more frequently if conditions warrant, or if the child's parent or teacher requests an evaluation."[378] In addition, the IDEA regulations state that "[e]ach public agency shall initiate and conduct meetings to review each child's IEP periodically and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year."[379] Under the IDEA, a reevaluation is done for eligibility considerations and to determine the needs of the student. Separate criteria are used to evaluate student progress during the annual IEP meeting. Thus, Federal law and policy emphasize proper development and implementation of reevaluations as a matter of civil rights compliance and to promote equal educational opportunity.

Education research and literature characterizes periodic reevaluations of students as an invaluable education practice.[380] According to the National Association of School Psychologists, the triennial reevaluation procedure required by the IDEA is a "critical assessment concern" among practitioners and researchers in the special edu-

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[375] *Id.* at 538.

[376] 34 C.F.R. § 104.35(a) (1996). OCR does not read section 504 as requiring that reevaluations, whether periodic or prior to a significant change in placement, be as comprehensive as the initial evaluation.

[377] 34 C.F.R. § 104.35(d) (1996). The section 504 regulation refers to the IDEA in stating that "[a] recipient to which this section applies shall establish procedures . . . for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement." *Id.*

[378] 34 C.F.R. § 300.534(b) (1996).

[379] 34 C.F.R. § 300.343(d) (1996).

[380] *See generally* Harvey F. Clarizio and Douglas W. Halgren, "Continuity in Special Education Placements: Are Reevaluations Really Necessary?" *Psychology in the Schools*, vol. 28, no. 4 (October 1991), pp. 317–24 (concluding that "the reevaluation process is a necessary component in providing appropriate programming for handicapped children"); John E. Brandt, "Triennial Reevaluation of Special Needs Students: A Review of Best Practices and Other Considerations," paper presented at the Annual Convention of the National Association of School Psychologists, Washington, DC, April 1993; National Association of State Directors of Special Education, "Reauthorization of the Individuals with Disabilities Education Act: Issues and Perspectives. Policy Forum Report" (Washington, DC: Project FORUM, September 1994) (hereafter cited as NASDSE, "Policy Forum Report"); Alex Thomas and Jeff Grimes, eds., *Best Practices in School Psychology–III* (Washington, DC: National Association of School Psychologists, 1995) (hereafter cited as Thomas and Grimes, *Best Practices–III*); Alex Thomas and Jeff Grimes, eds., *Best Practices in School Psychology–II* (Washington, DC: National Association of School Psychologists, 1990) (hereafter cited as Thomas and Grimes, *Best Practices–II*); Alex Thomas and Jeff Grimes, *Best Practices in School Psychology* (Washington, DC: National Association of School Psychologists, 1985) (hereafter cited as *Best Practices*); National Association of School Psychologists, "Position Statement: Three Year Evaluation of Handicapped Students" (Washington, DC: 1989) (hereafter cited as NASP, "Position Paper"); National Association of School Psychologists, "Supporting Paper for Position Statement on Reevaluation," *Communique* (Washington, DC: May 1989) (hereafter cited as NASP "Supporting Paper"); Edward M. Levinson and C. Frederick Capps, "Vocational Assessment and Special Education Triennial Reevaluations at the Secondary Level," *Psychology in the Schools*, vol. 22 (July 1985), pp. 283–92.

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cation environment.[381] Relatively high rates of change in classification of students with learning disabilities stress the need for thorough evaluation services.[382]

Education research outlines a number of ways student reevaluations can be effective in advancing educational purposes. Reevaluations can be useful in determining whether the student continues to meet the admission standards for entry into special education. They also can help in measuring the student's educational needs and comparing those needs with the student's current learning environment.[383] In addition, through the use of reevaluations, the school and parents have an opportunity to analyze whether the student's IEP goals have been or are continuing to be successfully met.[384] These purposes are consistent with OCR's policy of analyzing the IEP to ensure that what it requires is actually being delivered and that a student's individual needs as identified in his or her IEP are being met.[385]

As a goal, the special education community strives to encourage school staff to view the reevaluation process as an important tool for ensuring that a student's needs are being met and that program modifications are made. While there is general consensus among special education professionals that reevaluations can provide effective tools in implementing appropriate educational programs for students with disabilities, there also is concern that some school staff view the reevaluation process as no more than a procedural requirement. As a result, a number of questions have been raised about reevaluations, including how to make the process most effective and helpful to the student; what are the most thorough and educationally sound ways to conduct reevaluations; and what is the appropriate amount of time between evaluations and reevaluations.[386]

One concern in the special education community is that the reevaluation process has, in some schools, become merely another procedure conducted only to meet the IDEA's legal requirement.[387] Some school diagnostic staff, including special education teachers and school psychologists, have reduced the reevaluation requirement to "a procedural process which focuses primarily on ensuring that the requirements—rather than the intent—of the evaluation are met."[388] According to the National Association of State Directors of Special Education, the reevaluation process is in danger of becoming merely "an automatic timeline issue, rather than a true protection of the child, whereby the professional conducts a reassessment of the effectiveness of and necessity for the special education and related services program."[389] The low regard for reevaluations has generated concern among special educators because they recognize that failure to properly implement the reevaluation process can diminish the effectiveness of reevaluations in accomplishing important educational purposes for which they are intended.

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[381] Brandt, "Triennial Reevaluation of Special Needs Students," p. 3 (citing NASP, "Position Paper").

[382] *See* Clarizio and Halgren, "Continuity in Special Education Placements," p. 317. Clarizio and Halgren conducted a 3-year catchup prospective study of 654 rural special education students to determine what proportion has a change in classification and/or programming. They gathered information through a record review of students with disabilities from preschool through secondary school. Their findings showed that change in classification occurred at a rate of 38.2 percent. Changes in the type of program occurred for 33.1 percent and changes in the frequency of services occurred for 71.2 percent of the students in classroom programs. Ibid. They concluded that "the relatively high rate of change (38.2 percent) underscores the importance of the reevaluation process. Fueled by fiscal restraints, criticisms of testing procedures, and advocacy for cross-categorical services, there has been a trend toward circumventing the current mandated reevaluation responsibility. The present data indicate that the reevaluation process is a necessary component in providing appropriate programming for handicapped children." Ibid., p. 324.

[383] Brandt, "Triennial Reevaluation of Special Needs Students," p. 7 (citing T.S Hartshorne and E.B. Hoyt, "Best Practices in conducting re-evaluations" in Thomas and Grimes, *Best Practices in School Psychology*).

[384] Ibid., p. 7 (citing NASP, "Supporting Paper").

[385] *See* ibid. (citing J. Ross-Reynolds, "Best Practices in Conducting Re-evaluations" in Thomas and Grimes, *Best Practices in School Psychology–II*, pp. 195–206 (describing the IEP as essentially a "contract" between the school system, the parents, and the student such that the triennial reevaluation can serve as "a review of the contract to make sure what is promised is delivered")). *See also* pp. 197–205 above.

[386] *See generally* NASDSE, "Policy Forum Report"; Brandt, "Triennial Reevaluation of Special Needs Students"; Clarizio and Halgren, "Continuity in Special Education Placements," pp. 317–24.

[387] *See generally* NASDSE, "Policy Forum Report."

[388] Lucian Parshall and James R. Nuttall, "A Study of the Three Year Reevaluation Process," Michigan Department of

Among the special education community, there also is concern about the methodology chosen to implement reevaluations. Education researchers have focused their attention on several key issues in the implementation of the reevaluation process. On the use of the "multidisciplinary team" approach to conduct reevaluations,[390] there is debate over who is better qualified to assess students—special education teachers or school psychologists. There also are questions about which approach, educational or psychological, provides the most accurate and effective tests or other evaluative measures.

Both issues are involved in a further debate among special education professionals over whether testing needs to be part of the reevaluation process.[391] The concept of evaluations generally "refers to a systemic process of collecting data."[392] One concern expressed about testing in reevaluations is that some school staff may view particular tests as one method among many to evaluate a student without regard for any particular means to gauge the test's effectiveness in measuring a student's educational needs.[393] To address this concern, some researchers advocate for a strong link between the reevaluation and effective intervention for the student with a disability.[394]

The debate over testing in reevaluations also raises questions whether the tests should be traditional "norm-referenced" or standardized testing, usually conducted by special education teachers, or whether they should be "curriculum based" assessments, an approach relied on by school psychologists.[395] Some researchers contend that one

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Education, Special Education Services, Lansing, MI, in NASDSE, "Policy Forum Report," app. C, pp. 12–13. Parshall and Nuttall conducted a study of the reevaluation process in Michigan based on a survey of diagnostic staff including teacher consultants, school psychologists and social workers. They concluded that the overall implementation of the reevaluation process was "primarily driven by legislation that requires reevaluation to be performed every three years. Only in a very few cases, is the reevaluation request initiated by a teacher or parent." Ibid., p. 10. *See also* Brandt, "Triennial Reevaluation of Special Needs Students."

[389] NASDSE, "Policy Forum Report," p. 9 (stating that "[i]t is important to reduce the automatic process of reevaluation every three years. . . . Research has found that the process does not meet its original intent and syphons off limited service time of related service personnel (such as school psychologists, speech-language pathologists, and others").

[390] *See* 34 C.F.R. § 300.532(a)–(f) (1996). The IDEA regulations require that State educational agencies and LEAs ensure, at a minimum, that "[t]he evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability." *Id.* § 300.532(e).

[391] *See* Brandt, "Triennial Reevaluation of Special Needs Students," p. 4 (citing E.B. Hoyt and T.S. Hartshone, "Best Practices in Conducting Re-evaluations," in Thomas and Grimes, *Best Practices in School Psychology*; NASP, "Supporting Paper"; J. Ross-Reynolds, "Best Practices in Conducting Re-evaluations" in Thomas and Grimes, *Best Practices in School Psychology–II*, pp. 195–206).

[392] Ibid., p. 4.

[393] Ibid.

[394] Ibid., p. 5 (citing J. Ross-Reynolds, "Best Practices in Conducting Re-evaluations," in Thomas and Grimes, *Best Practices in School Psychology–II*, p. 196 (stating "if effective interventions for the child are not the outcome, your evaluation should be regarded as biased and discriminatory. . . the quality of our work must ultimately be judged by the effects it produces, not by the elegance of our psychometrics or our terminology")).

[395] *See* ibid., pp. 7–13.

way to use the reevaluation process to accomplish successful intervention is through "curriculum based" testing instead of "norm-referenced" or standardized testing. The use of curriculum-based testing is a relatively recent development in the assessment methodology used by school psychologists in conducting reevaluations.[396] A number of researchers advocate its use over traditional "norm-referenced" testing.[397]

According to some education researchers, curriculum-based assessment may be described as "a set of *standardized* and *specific* measurement procedures that can be used to quantify student performance in reading, spelling, mathematics computation, and written expression."[398] Curriculum-based assessment may become the assessment methodology of choice for conducting reevaluations because it provides for a "continuous measurement system."[399] This means that "it provides for a systematized procedure that is present at the development stage, the implementation stage, and the evaluative stage of the curricula." In addition, unlike standardized or "norm-referenced" tests, curriculum-based measures are "more sensitive to specific objectives of the curriculum, are more content-valid, and provide a better match between test content and curriculum."[400] Some researchers contend that because the IEP process requires measurement of small amounts of progress in a student's performance over short periods of time, curriculum-based testing lends itself particularly well to frequent assessment.[401] They argue that standardized achievement tests are designed to remain stable over time and are therefore incapable of performing this function; whereas curriculum based measurements work best with frequent "probes" to determine progress.[402]

The frequency of reevaluation is the focus of another debate relating to the reevaluation process. Federal policy as enunciated in the section 504 regulations provide for "periodic reevaluations."[403] There is currently a provision in the IDEA regulations that calls for a *yearly* review of the IEP to determine whether there has been a change in the student's circumstances.[404] In addition, there is strong support in the special education community for amending the IDEA regulations by removing the provision requiring a triennial reevaluation and replacing it with one that requires an annual reevaluation.[405]

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[396] Ibid., p. 9.

[397] *See generally* ibid.; Jane Ross-Reynolds, "Best Practices in Conducting Re-evaluations" in Thomas and Grimes, *Best Practices in School Psychology–II*, pp. 195–206; Mark R. Shinn, Victor Nolet, and Nancy Knutson, "Best Practices in Curriculum Based Measurement" in Thomas and Grimes, *Best Practices in School Psychology–II*, pp. 287–307 (hereafter cited as Shinn et al., "Best Practices in Curriculum Based Measurement").

[398] Brandt, "Triennial Reevaluation of Special Needs Students," p. 10 (citing Shinn et al., "Best Practices in Curriculum-Based Measurement" in Thomas and Grimes, *Best Practices in School Psychology–II*, p. 290).

[399] Ibid., p. 12.

[400] Ibid. (citing Jane Ross-Reynolds, "Best Practices in Conducting Re-evaluations" in Thomas and Grimes, *Best Practices in School Psychology–II*, p. 202).

[401] Ibid.

[402] Ibid., pp. 12–14. *See also* Jane Ross-Reynolds, "Best Practices in Conducting Re-evaluations" in Thomas and Grimes, *Best Practices in School Psychology–II*, pp. 195–206; Shinn et al., "Best Practices in Curriculum Based Measurement," pp. 287–307.

[403] 34 C.F.R. § 104.35(d) (1996) (stating that "[a] recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.").

[404] 34 C.F.R. § 300.343(d) (1996).

Underlying these debates over the methodology used and frequency in conducting the reevaluation process is the question of how to maximize its efficacy.[406] Careful planning and execution along with input from a variety of sources are essential elements for conducting effective reevaluations that provide accurate indications of necessary program modifications.[407] Therefore, some researchers contend that the use of educational and psychological measurements of students' needs is important to demonstrating that reevaluations are being conducted with appropriate thoroughness and educational soundness.[408] They note that both "norm-referenced" and curriculum-based assessment procedures have their place in the reevaluation process.[409] The most effective practices might therefore include, along with triennial reevaluations and annual IEP reviews, and "norm-referenced" testing, assessment procedures such as observations, interviews, narrative recordings, and overall assessment and reassessment of a student's learning environment.[410] According to the National Association of State Directors of Special Education, students are best served when schools seek to provide the maximum evaluation and reevaluation services, based on a student's educational needs and not solely as a means of meeting a procedural requirement.[411] The student is likely to enjoy the greatest educational benefit by being provided with both triennial reevaluations and annual IEP reviews; special education teacher and school psychologist assessments; and "norm-referenced" and curriculum based assessment measurements.

Reevaluations: OCR's Enforcement Efforts

There are two main requirements for reevaluations in the section 504 regulations. Under the first requirement, a school district must evaluate a student with a disability prior to "any subsequent significant change" in the initial or existing placement of a student with a disability.[412] In policy and policy clarification letters, OCR has provided examples of situations that constitute a significant change in placement. For example, such situations include: (1) transfer from a regular public school in which the student has contact with nondisabled children to a school attended only by students with disabilities,[413] (2) expulsion from school, (3) a change in the number of hours per week a student with a disability spends in regular versus special education, or (4) a switch

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[405] NASDSE, "Policy Forum Report," pp. 9–10 (stating that "[i]t is recommended that the regulation be rescinded and it be replaced with a yearly examination by the IEP team of the effectiveness of the special education and related services program that are necessary to provide FAPE").

[406] Brandt, "Triennial Reevaluation of Special Needs Students," p. 7.

[407] *See* Parshall and Nuttall, "A Study of the Three Year Reevaluation Process," p. 13; Brandt, "Triennial Reevaluation of Special Needs Students."

[408] *See generally* Brandt, "Triennial Reevaluation of Special Needs Students."

[409] Ibid., p. 13.

[410] Ibid., p. 14.

[411] *See* NASDSE, "Policy Forum Report," pp. 9–11.

[412] *See* 34 C.F.R. § 104.35(a) (1996). The section 504 regulation does not refer to this requirement as a reevaluation and, in fact, has a separate provision, 34 C.F.R. § 104.35(d), entitled "Reevaluation." Nevertheless, the evaluation required under 34 C.F.R. § 104.35(a) also is a reevaluation in that it occurs subsequent to the evaluation conducted prior to the student's initial placement. The distinction between the two reevaluation requirements is in the required timeframes; one requires a reevaluation prior to "any subsequent significant change in placement," while the other requires "periodic" reevaluations.

[413] *See* Daniels, "Guidance on Section 504 and EHA Distinctions" policy memorandum, p. 7.

from a special education placement to a regular education placement.[414]

This first reevaluation requirement often applies when a school wishes to discipline students with disabilities such as students with behavior disabilities or serious emotional disturbances who are disruptive to the classroom or are dangerous. When a school district disciplines a student with a disability because of disruptive or dangerous behavior, it may be required to reevaluate the student prior to taking certain action such as suspension from school.[415] OCR has clarified that a "significant change in placement," as described in the section 504 regulations, includes exclusions of students with disabilities from school for an indefinite period or for more than 10 consecutive days.[416] Further, a series of suspensions of 10 days or fewer in duration also may constitute a significant change in placement if they create a pattern of exclusion.[417]

When determining whether a school district has violated this first reevaluation requirement by its disciplinary action towards a student with a disability, OCR considers each situation on a case-by-case basis, taking into account factors such as the length of each suspension, the proximity of the suspensions to one another, and the total amount of time a student is excluded from schools.[418]

Under the second reevaluation requirement, OCR's standard is that a recipient school must have procedures in place so that students with disabilities are reevaluated periodically.[419] In 1976, when the section 504 regulations originally were proposed, OCR advanced a stricter standard requiring a complete reevaluation of a student with a disability annually.[420] This proposal was rejected, however, because "[t]he Department concluded that it is inappropriate in the section 504 regulation to require full reevaluation on such a rigid schedule."[421]

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[414] *See* Judith E. Banks, Acting Regional Director, OCR, Region VII, DOEd, letter to Woody Houseman, Education Program Specialist for Gifted/Talented/Creative and Homebound/Hospital Programs, Kansas State Department of Education, Topeka, KS, Mar. 4, 1986, 305 EHLR 34, 36.

[415] In discipline situations one aspect that is unique to this first reevaluation requirement is that the first step of the reevaluation must include a determination of whether the misconduct of the student is caused by the student's disability. If the school determines that the student's misconduct is caused by the student's disability, the evaluation team must continue the evaluation to determine whether the student's current educational placement is appropriate. If the school determines that the misconduct is not caused by the student's disability, it may exclude the student from school in the same manner as similarly situated nondisabled students are excluded. *See* Daniels, "Long-term Suspension" policy memorandum, pp. 2–3. The policy further notes "that these procedures need not be followed for students who are handicapped solely by virtue of being alcoholics or drug addicts with regard to offenses against school disciplinary rules as to the use and possession of drugs and alcohol." Ibid., p. 3. *See also* Smith, "Suspension of Handicapped Students" policy memorandum, p. 1, 16 EHLR 492.

[416] *See* Daniels, "Long-term Suspension" policy memorandum, p. 2. *See also* Judith E. Banks, Regional Civil Rights Director, OCR, Region VII, DOEd, letter to Millard Grell, Interim Superintendent, Sioux City Community School District, Sioux City, IA, re: Complaint No. 07–89–1062, Oct. 16, 1989, 16 EHLR 308, 310; Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to John Lambert, Superintendent, East Stroudsburg Area School District, East Stroudsburg, PA, re: Complaint No. 03–88–1072, 353 EHLR 108, 110.

[417] *See also* Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III. DOEd, letter to William Williams, Superintendent, St. Mary's Area School District, St. Mary's, PA, re: Complaint No. 03–90–1014, Apr. 26, 1990, 16 EHLR 1156 (hereafter cited as OCR, Complaint No. 03–90–1014, 16 EHLR 1156).

[418] *See* Daniels, "Long-term Suspension" policy memorandum, p. 2. *See, e.g.*, OCR, Complaint No. 03–90–1014, 16 EHLR 1156; Office for Civil Rights, Region VII, U.S. Department of Education, letter to Dr. S. Eugene Denisar, Superintendent, North Kansas City #74 School District, North Kansas City, Missouri, re: Complaint No. 07-90–1010, Feb. 7, 1990, 16 EHLR 758, 759 (hereafter cited as OCR, Complaint No. 07–90–1010, 16 EHLR 758).

[419] 34 C.F.R. § 104.35(d) (1996).

[420] *See* 41 Fed. Reg. 20,309 (1976).

[421] 34 C.F.R. pt. 104, app. A, no. 25 (1996).

The language of the section 504 regulations does not define "periodically" and, therefore, is vague in terms of how often schools should conduct reevaluations to comply with section 504. Consequently, OCR's existing standard on reevaluations leaves elementary and secondary schools with some flexibility on setting a periodic schedule to reevaluate students with disabilities.

The section 504 regulations also contain a second standard for compliance. As with OCR's requirement that education programs meet the individual needs of a disabled student,[422] OCR added this second standard to promote consistency between section 504 and IDEA compliance. Under this second standard, a reevaluation procedure consistent with the IDEA is one means of meeting the section 504 reevaluation requirement.[423] The IDEA's standard on reevaluation is that a student with a disability be reevaluated at least every 3 years but more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.[424] Although the IDEA standard is more specific, OCR does not consider the failure to meet this standard as noncompliance with the section 504 regulations. Further, OCR policy notes that analysis of reevaluation "should not be in terms of deviations from the [IDEA] standard; it should be in terms of a failure to evaluate students periodically, the Section 504 standard."[425]

In defining "periodic" reevaluations, OCR uses the IDEA 3-year standard as guidance for determining a reasonable amount of time for reevaluations.[426] When conducting its investigation of a school district, OCR also has considered the State standard on reevaluations and the time frame adopted by a school district in its procedures or policies.[427] For example, OCR treats a State's adoption of the IDEA's 3-year standard as evidence that the State considers 3 years to be the appropriate standard for periodic reevaluations.[428] However, in at least one case where a school district adopted a more frequent reevaluation period, 2-year reevaluations, OCR determined the school district's compliance with the section 504 regulation requirement using the 3-year standard for reasonableness.[429] Consequently, OCR has not necessarily held a school district to the reevaluation period established in that district's policies and procedures.

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[422] *See* pp. 197–205 above.

[423] 34 C.F.R. § 104.35(d) (1996).

[424] *See* Pub. L. No. 105–17, § 614(a)(2)(A) (1997); 34 C.F.R. § 300.534(b) (1996).

[425] Daniels, "Guidance on Section 504 and EHA Distinctions" policy memorandum, p. 7.

[426] *See* Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to Sally Akan, General Counsel, School District of Philadelphia, Philadelphia, PA, re: Case No. 03–90–5001, Feb. 28, 1992, p. 5 (hereafter cited as OCR, Case No. 03–90–5001); OCR, Region V, DOEd, letter to Dallas E. Beyer, Director, Macon-Piatt Special Education District, Decatur, IL, re: Case No. 05–89–5001, Mar. 7, 1989, 16 EHLR 22, 23 (hereafter cited as OCR, Case No. 05–89–5001, 16 EHLR 22); Kenneth A. Mines, Regional Director, OCR, Region V, DOEd, letter to Charles Clark, Superintendent Vigo County School Corporation, Terre Haute, IN, re: Complaint No. 15–91–1085, Oct. 11, 1991, 18 IDELR 473, 474 (hereafter cited as OCR, Complaint No. 15–91–1085, 18 IDELR 473). *See also* Linda McGovern, Acting Regional Director, OCR, Region V, DOEd, letter to Jack Curless, Superintendent, Thorton Township High School District #205, Harvey, IL, re: Case No. 05–86–5004, Oct. 30, 1986, 311 EHLR 85, 87–88 (hereafter cited as OCR, Case No. 05–86–5004, 311 EHLR 85).

[427] *See* OCR, Case No. 05–89–5001, 16 EHLR 22, 23; Jesse L. High, Acting Regional Director, OCR, Region IV, DOEd, letter to Sovel Stephens, Superintendent, Russell County School District, Jamestown, KY, re: Complaint No. 04–86–1054, June 17, 1986, 352 EHLR 253, 255–56.

[428] *See* Daniels, "Guidance on Section 504 and EHA Distinctions" policy memorandum, p. 7.

[429] For example, in one case, the special education guidelines developed by the school district and the State guidelines called for a reevaluation of exceptional students at least every 2 years. In the course of its compliance review, OCR sought to determine whether there were delays in conducting periodic reevaluations of such duration as to effectively deny students with disabilities a free appropriate public education. OCR reviewed the files of 768 students enrolled in special education at 25 of the school district's schools, and it considered the number of students who were reevaluated within a 3-year period. OCR, Case No. 03–90–5001, p. 5.

OCR does not apply the 3-year standard as a strict rule.[430] In determining compliance, it assesses whether a school district conducted the reevaluation within a reasonable period of time, using a measure of 3 years as guidance to define what is reasonable. For example, in one case, the school district conducted a student's reevaluation 11 days after the 3-year mark. In that case, OCR determined that the delay was insufficient evidence for determining that the district violated the section 504 regulations.[431]

When conducting section 504 investigations or reviews of a school district's entire reevaluation process, as opposed to an individual student's complaint, OCR has looked at a sample of the school district's files for students enrolled in special education.[432] OCR has considered whether there is documentation in the files to show that the school district conducts its reevaluations within at least a 3-year period. However, the failure of a school district to reevaluate *each and every* student with a disability within a 3-year period will not necessarily lead to a finding of noncompliance. In some cases, OCR has considered whether a substantial percentage of the students have been reevaluated within the 3-year period. For example, when OCR reviewed the files of 768 students in special education at 25 of a district's schools and found that the school district reevaluated all but 1 percent of the students within a 3-year period, it determined that the school district's reevaluation process was in compliance with the section 504 regulations. However, OCR urged the school district to ensure that all special education students were reevaluated within a 3-year period.[433]

Both types of reevaluations—reevaluations prior to a significant change in placement and periodic reevaluations—must be as comprehensive as the type of evaluation required prior to taking action on the initial placement of a student.[434] This means that (1) tests and other evaluation materials used for evaluation and placement must be "validated for the specific purpose for which they are used" and "administered by trained personnel in conformance with the instructions provided by their producer;" (2) they must include tests and other evaluation materials "tailored to assess to specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;" and (3) the tests must be "selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills."[435] In addition, when a school district interprets evaluation data or makes placement decisions for a student with a disability, it should (1) draw upon information from a variety of sources; (2) ensure that the information obtained from such sources is documented and carefully considered; (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (4) ensure that placement occurs with persons who are not disabled, to the maximum extent appropriate to the needs of the student with disabilities, and that placement is in the regular education environment unless it is demonstrated that the student cannot achieve satisfactorily in that environment with the use of supplementary aids and resources.[436]

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[430] *See* Daniels, "Guidance on Section 504 and EHA Distinctions" policy memorandum, p. 7 ("Even though the recipient has made known its intention to meet the requirements of the [IDEA], and the [IDEA] requires reevaluation every three years, the failure to conduct a reevaluation after three years and one month does not automatically violate Section 504.").

[431] Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Bill McNeal, Superintendent, Wake County School District, Raleigh, NC, re: Complaint No. 04–95–1260, July 7, 1995, 23 IDELR 836, 837.

[432] *See* OCR, Case No. 03–90–5001, p. 5; Rolando Alvarado, Director, Compliance Division, OCR, Region II, DOEd, letter to Donald Merachnik, Superintendent, Union County Regional High School District 1, Springfield, NJ, re: Complaint No. 02–93–1110, May 31, 1995, p. 3; OCR, Region VIII, DOEd, letter to Burlington School District, Burlington, CO, re: Complaint No. 08–89–1032, 08–89–1045, Nov. 9, 1989, 16 EHLR 459; OCR, Case No. 05–89–5001, 16 EHLR 22, 23; Jesse L. High, Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Richard P. Bowling, Superintendent, Leslie County School District, Hyden, KY, re: Complaint No. 04–87–1085, May 22, 1987, 352 EHLR 453, 459 (OCR examined a sample of approximately 106 student special education files which included all exceptionalities served in the district.); OCR, Case No. 05–86–5004, 311 EHLR 85 (A 50 percent sample of student files was reviewed as well as other files as necessary.).

[433] OCR, Case No. 03–90–5001, p. 5.

[434] *See* 34 C.F.R. § 104.35(d) (1996) ("A recipient to which this section applies shall establish procedures, *in accordance with paragraph (b) of this section*, for periodic reevaluation of students who have been provided special education and related services.") (emphasis added).

When assessing compliance with the reevaluation requirements of the section 504 regulations, OCR has looked into the type of reevaluations conducted on the students.[437] For example, in one case, a student received an initial comprehensive evaluation on October 18 and November 30, 1983. This evaluation included information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. Based on the 1983 date of the evaluation, a 3-year evaluation would have been due in November 1986. Although OCR found that on March 22, 1986, the district had conducted a psychoeducational evaluation of the student based on the parent's request, OCR also found that the evaluation was not a comprehensive 3-year evaluation and not considered by the district to be a comprehensive 3-year evaluation.[438] In its investigations into the reevaluation requirement, OCR also has considered whether a school district followed other procedural aspects of the reevaluation requirement. For example, in another case, OCR found that although the school district had procedures for periodic reevaluation on a triennial basis, it failed to observe the documentation requirement in its own procedures and this failure caused considerable uncertainty as to when the reevaluations were due. To the extent that this caused the complainants to believe that their son's right to periodic reevaluation was not being implemented, OCR determined the school district's actions failed to comport with the section 504 procedures.[439]

In terms of remedies, OCR has relied on assurances that a school district will take action to conduct timely reevaluations and has thereafter monitored the school district to ensure completion of the reevaluations.[440] For example, in one case,

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[435] 34 C.F.R. § 104.35(b) (1996).

[436] *See* 34 C.F.R. §§ 104.35(b)–(c), 104.34(a) (1996).

[437] *See* Thomas F. Esterly, Acting Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Marvin Edwards, Superintendent, Topeka U.S.D. #501, Topeka, KS, re: Complaint No. 07–87–1193, Dec. 28, 1987, 352 EHLR 584, 585 (hereafter cited as OCR, Complaint No. 07–87–1193, 352 EHLR 584).

[438] OCR, Complaint No. 07–87–1193, 352 EHLR 584, 585. In its investigation, OCR investigators established that the district failed to provide the student with a timely 3-year reevaluation in November 1986 and that the failure constituted a violation of the reevaluation requirement in the section 504 regulation. *Id.*

[439] *See* Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to Robert Ingram, Superintendent, Jefferson County Schools, Charles Town, WV, re: Complaint No. 03–89–1175, Dec. 20, 1989, 16 EHLR 471, 473 (Because OCR later found that the school district had corrected its practices on documenting meetings, it determined that the school district was in compliance with § 104.35(d) of the section 504 regulation).

[440] *See* OCR, Case No. 05–89–5001, 16 EHLR 22, 24; OCR, Complaint No. 07–87–1193, 352 EHLR 584, 585; Jesse L. High, Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Richard P. Bowling, Superintendent, Leslie County School District, Hyden, KY, re: Complaint No. 04–87–1085, May 22, 1987, 352 EHLR 453, 459; Linda A. McGovern, Acting Regional Director, OCR, Region V, DOEd, letter to Richard MacFeely, Superintendent, Normal Community Unit School District #5, Normal, IL, re: Complaint No. 05–87–1004, Jan. 27, 1987, 352 EHLR 434, 438 (hereafter cited as OCR, Complaint No. 05–87–1004, 352 EHLR 434); OCR, Case No. 05–86–5004, 311 EHLR 85, 91.

OCR found that a school district failed to reevaluate a student with a disability in a timely manner. The school district attributed the failure to reevaluate to a backlog of reevaluations in the district. However, when the district indicated that it had hired additional staff to reduce this backlog and provided assurances that it would complete a reevaluation of the complainant student in a timely manner, OCR considered the district to be in compliance with the section 504 regulations.[441]

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[441] OCR, Complaint No. 05–87–1004, 352 EHLR 434, 438. *See also* OCR, Complaint No. 15–91–1085, 18 IDELR 473, 474 ("[T]he reason cited for the failure to timely reevaluate students were the high numbers of referrals for initial evaluations and reevaluations and the lack of staff to process them . . . OCR found that the Recipients had taken some actions reasonably calculated to resolve this problem." It obtained a grant which allowed it to hire staff members, including one full-time and one part-time psychologist and two assistants in evaluations. OCR found the school district in compliance based on assurances that the district provided indicating it would remedy the violations.)

Chapter 7

Notifying and Involving Parents in Their Children's Education

Background

Education research and studies have found parental involvement is important when developing individualized education programs for and placing students with disabilities.[1] According to the National Council on Disability's 1995 report, *Improving Implementation of the Individuals with Disabilities Education Act*, parental involvement provides a "check" to ensure that schools will fulfill their duties to provide students with disabilities the free appropriate public education to which they are entitled.[2] It facilitates informed decisions because the parent adds personal knowledge about the child to the professional knowledge of educators and evaluators.[3] Parental involvement also helps to ensure that students with disabilities have a well-rounded education, access to a variety of curricular options, and the chance to maximize their abilities in different curricular areas.[4] For these reasons, some scholars have hailed active parental involvement in special education as a "cherished ideal" to support the education and development of students with disabilities.[5]

The discussion on parental notification and involvement in this chapter largely focuses on the Individuals with Disabilities Education Act (IDEA), originally enacted as the Education for All Handicapped Children Act in 1975, because it is the most thorough, comprehensive Federal law explicitly making parental notification and involvement an important principle in the development and implementation of all education programs. Before enactment of the Education for All Handicapped Children Act in 1975 (Congress renamed the statute "IDEA" in 1990), parental involvement was largely influenced, if not determined, by the willingness and commitment of educators who encouraged such involvement. The more common practice had the educator as the source of information and knowledge about the child and the parent merely as the recipient of this information.[6] As information sources, educators tended neither to discuss the content of the child's educational program nor ask for parental involvement in such important matters as educational goals or the child's placement.[7] With the passage of the Education for All Handicapped Children Act, parental involvement and participation, however, became a legal requirement.

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[1] References to "parental involvement," "parental notice," or other use of the word "parent" will be presumed to also include a child's guardian(s).

[2] National Council on Disability, *Improving Implementation of the Individuals with Disabilities Education Act: Making Schools Work for All of America's Children* (May 9, 1995), p. 101 (hereafter cited as NCD, *Improving Implementation of the Individuals with Disabilities Education Act*) (Parental participation "creates a system of checks and balances, so that parents and students on the one hand and educators on the other can hold each other accountable for the student's education.").

[3] Ibid.

[4] *See* ibid., p. 114 ("Parent and student participation and collaboration in the design and delivery of special education services is essential, if these services are to be relevant and effective in maximizing a student's academic and social development."). *See also* ibid., p. 112 ("Parents still have to push far too much to get academic skills into the curriculum in special education, and I think more parents, because of the advocacy programs, are aware that they can push and can get things into their child's curriculum that they thought were not available." Comments of Ginny Gilman, testifying at the field hearing on IDEA in Albuquerque, New Mexico.). *See also* Kathleen V. Hoover-Dempsey and Howard M. Sandler, "Parental Involvement in Children's Education: Why Does It Make a Difference?" *Teachers College Record*, vol. 97, no. 2 (Winter 1995), pp. 326–28.

[5] Beth Harry, Norma Allen, and Margaret McLaughlin, "Communication Versus Compliance: African-American Parents' Involvement in Special Education," *Exceptional Children*, vol. 61 (February 1995), p. 364 (hereafter cited as Harry et al., "Communication Versus Compliance").

Federal Laws, Policies, and Program Initiatives

Recognizing the importance of parental involvement in the education of students with disabilities, Congress and the U.S. Department of Education (DOEd) devised many initiatives to promote parental knowledge of educational programs and process for students with disabilities and to facilitate parental involvement in the educational system. For example, the IDEA's Part B provisions and implementing regulations require a school district to provide written notice to parents before the district proposes or refuses to initiate or change the identification, evaluation, or educational placement of a student or the provision of a free appropriate public education to the student.[8] They specify that parents should be included as participants in meetings to develop, review, and revise their child's individual education program (IEP).[9] They place affirmative duties on State education agencies and school districts to have in place due process procedures for students with disabilities and their parents.[10] They also contain provisions to ensure that parents of students with disabilities have an opportunity to participate in the State-level policymaking process through service on an advisory panel.[11]

The section 504 regulations require a federally funded school district to notify students with disabilities and their parents of its responsibilities to provide a free appropriate public education to qualified persons with disabilities.[12] A school district also must provide parents or guardians with notice before taking action to identify students as having disabilities, evaluate students and their needs for special education and related services, or begin or change placement of students with disabilities.[13] Further, a school system must provide parents with an opportunity to examine records relevant to the identification, evaluation, or educational placement of their disabled child and to participate in an impartial due process hearing related to identification, evaluation, or placement of their child.[14]

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[6] Sharon Vaughn, Candance S. Bos, Jan E. Harrell, and Beth Lasky, "Parent Participation in the Initial Placement/IEP Conference Ten Years After Mandated Involvement," *Journal of Learning Disabilities*, vol. 21 (February 1988), p. 82 (hereafter cited as Vaughn et al., "Parent Participation in the Initial Placement/IEP Conference").

[7] Ibid.

[8] Pub. L. No. 105–17, § 615(b)(3) (1997); 34 C.F.R. § 300.504(a) (1996).

[9] Pub. L. No. 105–17, §§ 602(a)(11), 614(c)(1)(B) (1997); 34 C.F.R. §§ 300.344(a), 300.345(a) (1996).

[10] Pub. L. No. 105–17, § 615 (1997).

[11] A State's plan under the IDEA must provide that the State has an advisory panel, appointed by the Governor or any other authorized official under State law, composed of individuals involved in or concerned with the education of children with disabilities, including handicapped individuals, teachers, parents or guardians of children with disabilities, State and local education officials, and administrators of programs for children with disabilities which advise the State education agency of unmet needs, comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities, and assists the State in developing and reporting such data and evaluations as may assist the Secretary. Pub. L. No. 105–17, § 612(a)(20) (1997).

[12] 34 C.F.R. § 104.32(b) (1996).

[13] *See* 34 C.F.R. § 104.36 & pt. 104, app. A, subpt. D, no. 25 (1996).

[14] *Id.* § 104.36.

Provisions in the IDEA create Federal requirements for parental notice. In addition, they prescribe that certain opportunities will be made available so that parents can participate in their children's education and the policymaking process. The provisions clearly provide for parental participation in a due process hearing.[15]

With the passage of the IDEA Amendments of 1997, Congress strengthened provisions in the act relating to parental participation in the education of children and youth with disabilities, particularly in the preparation of the IEP and in placement and evaluation.[16]

These provisions require States and local educational agencies to ensure parental involvement in evaluation and placement decisionmaking at the outset of the decisionmaking process. The act states, for example, that in conducting evaluations to determine the presence of a disability for a particular child, a local educational agency must:

> use a variety of assessment tools and strategies to gather relevant functional and developmental information, *including information provided by the parent*, that may assist in determining whether the child is a child with a disability and the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general curriculum or, for preschool children, to participate in appropriate activities. . .[17]

In addition, the IDEA Amendments of 1997 require that parents must be included in any placement decision. The act states that: "[e]ach local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child."[18]

Section 504 regulations, however, do not specify parental participation in the initial evaluation and decisionmaking process. These regulations do not refer to parents in the decisionmaking process from the outset as the IDEA itself does. The regulations now only state that in interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; and (2) ensure that the placement decision is made by a group of persons, including persons knowledgeable about a child, the meaning of the evaluation data, and the placement options.[19]

Under the regulations, parents are given the right to challenge a school's decisions relating to the identification, evaluation, or placement of a student with a disability, although they have no right to participate in the school's initial decisionmaking. Under IDEA Part B regulations parents are assured the right to be present at an IEP meeting which is intended for the purpose of developing, reviewing, and revising a child's IEP.[20] In addition, school districts must obtain parental consent before conducting a replacement evaluation of a student or initially placing a student with a disability in a program providing special education and related services.[21]

Beyond the provisions on parental notice and participation in IDEA Part B, its implementing regulations, and the section 504 regulations, there are several Federal financial assistance programs that support family involvement in the education of children with disabilities. These programs seek to promote parents' knowledge of and participation in the education of their child. For example, one Federal grants program under the IDEA supports the establishment and operation of community parent resource centers across the country.[22] These centers provide many services, with a focus to "provide training and information that meets the training and information needs of parents of children with disabilities."[23] In addition, there are regional resource centers that also provide invaluable assistance to many parents of children with disabilities.[24] Nationwide, there are six regional resource centers.[25]

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[15] *See* Pub. L. No. 105–17, § 615 (1997).

[16] *See id.* §§ 614(b)(2)(A), 614(d) (1997).

[17] *Id.* § 614(b)(2)(A) (1997) (emphasis added).

[18] *Id.* § 614(f) (1997).

[19] 34 C.F.R. § 300.533(a)(1)&(3) (1996); 34 C.F.R. § 104.35(c)(1)&(3) (1996).

[20] *See* Pub. L. No. 105–17, § 614(d) (1997); 34 C.F.R. §§ 300.344(a), 300.345(a) (1996).

[21] Pub. L. No. 105–17, § 615(b)(3) (1997); 34 C.F.R. § 300.504(b) (1996).

There are also parent training and information centers that provide assistance directly to parents, and four specialized technical assistance centers and one Federal resource center to assist parents of children with disabilities.[26] The parent training and information program provides grants to private nonprofit organizations "for the purpose of providing training and information to parents of infants, toddlers, children, and youth with disabilities and persons who work with parents to enable such individuals to participate more effectively with professionals in meeting the educational needs of children with disabilities."[27] Specifically, these parent training and information programs:

- provide training and information that meets the training and information needs of parents of children with disabilities living in the area served by the center, particularly underserved parents and parents of children who may be inappropriately identified;

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[22] *See* Pub. L. No. 105–17, § 683 (1997).

[23] *Id.* § 683(b)(1) (1997).

[24] *See id. § 685(a) (1997).*

[25] Region 1, the Northeast Regional Resource Center (NERRC), in Burlington, VT, serves Maine, Vermont, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, and New Jersey. Region 2, the Mid-South Regional Resource Center (MSRRC), in Lexington, KY, serves Delaware, Kentucky, Maryland, North Carolina, South Carolina, Tennessee, Virginia, West Virginia, and the District of Columbia. Region 3, the South Atlantic Regional Resource Center (SARRC), in Plantation, FL, serves Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, New Mexico, Oklahoma, Puerto Rico, Texas, and the Virgin Islands. Region 4, the Great Lakes Area Regional Resource Center (GLARRC), in Columbus, OH, serves Indiana, Illinois, Michigan, Minnesota, Ohio, Pennsylvania, and Wisconsin. Region 5, the Mountain Plains Regional Resource Center (MPRRC), in Logan, UT, serves Colorado, Iowa, Missouri, Montana, Nebraska, North Dakota, South Dakota, Utah, Wyoming, and the Bureau of Indian Affairs. Region 6, the Western Regional Resource Center (WRRC), in Eugene, OR, serves Alaska, American Samoa, Arizona, California, Commonwealth of the Northern Mariana Islands, Federated States of Micronesia, Guam, Hawaii, Idaho, Nevada, Oregon, Republic of the Marshall Islands, Republic of Palau, and Washington. U.S. Department of Education (DOEd), Official Response to U.S. Commission on Civil Rights' Request for Information, Feb. 1, 1996, attachment II.A.7 (DOEd, Office of Special Education Programs, "OSEP Technical Assistance & Dissemination Projects").

[26] *See* Pub. L. No. 105–17, §§ 682, 685 (1997). The four specialized technical assistance centers are the National Early Childhood Technical Assistance Service, the Technical Assistance for Parents Program, the Deaf-Blind Technical Assistance Center, and the National Transition Alliance. DOEd, Office of the General Counsel, Response to Affected Agency Review of U.S. Commission on Civil Rights, *Equal Educational Opportunity and Nondiscrimination for Students with Mental Retardation, Learning Disabilities, Behavioral Disabilities, and Serious Emotional Disturbance: Federal Enforcement of Section 504* (draft) (May 22, 1997), chap. 7, item 6, p. 20.

In addition to the resource and technical assistance centers, there also is the National Parent Information Network (NPIN) which is a national electronic information service for parents, parent educators, and others working collaboratively with families. It is being developed by the ERIC Clearinghouses on Elementary and Early Childhood Education and on Urban Education. In 1994, NPIN offered a collection of parent-oriented material on child development, education, and health issues, as well as a question-answering service for parents. Already available on the Internet, NPIN will be accessible in parent centers, public libraries, schools, social service agencies, and health clinics. Jennifer Ballen and Oliver Moles, *Strong Families, Strong Schools* (ERIC Clearinghouse on Urban Education for the U.S. Department of Education and the National Parent Information Network, no date), School-Family Partnerships, p. 6.

[27] Pub. L. No. 105–17, § 682 (1997).

- assist parents to understand the availability of, and how to effectively use, procedural safeguards under this Act, including encouraging the use, and explaining the benefits, of alternative methods of dispute resolution, such as the mediation process described in section 615(e);

- serve the parents of infants, toddlers, and children with the full range of disabilities;

- assist parents to better understand the nature of their children's disabilities and their educational and developmental needs;

- assist parents to communicate effectively with personnel responsible for providing special education, early intervention, and related services;

- assist parents to participate in decisionmaking processes and the development of individualized education programs under part B and individualized family service plans under part C;

- assist parents to obtain appropriate information about the range of options, programs, services, and resources available to assist children with disabilities and their families; and

- assist parents to understand the provisions of this Act for the education of, and the provision of early intervention services to, children with disabilities.[28]

A third Federal program makes grants to support national clearinghouses.[29] Two of the five national clearinghouses provide information to parents of students with mental retardation, learning disabilities, behavioral disabilities, or serious emotional disturbances. The ERIC Clearinghouse on Disabilities and Gifted Education (ERIC/EC) responds to requests for information in its subject areas. It produces special publications on current research, programs, and practices. It also provides outreach to parents of children with disabilities. Specifically, it offers the "Parents Ask ERIC" question-answering service, the National Parent Information Network, an ongoing series of parent brochures, and more than 200 other publications for parents and parent educators. The National Information Center for Children and Youth with Disabilities performs a number of functions. It provides personal responses to questions on disability topics, including specific disabilities, special education, and family issues. It provides referrals to other organizations that assist parents of students with disabilities. The National Information Center for Children and Youth with Disabilities also conducts information searches on its extensive databases and library, and it issues publications that include parent guides.[30]

Even prior to the entry of children with disabilities into public school systems, Federal policy strives to support and improve the family's ability to meet the special needs of a disabled child. Part C of the IDEA provides financial assistance to States "to enhance their capacity to provide quality early intervention services and expand and improve existing early intervention services being provided to infants and toddlers with disabilities and their families."[31] Early intervention services include, among other things, "family training, counseling, and home visits."[32]

As noted above, the emphasis on parental involvement in Federal law and policy is a product of the importance placed on this factor in educational literature and by parents active in or seeking involvement in their children's education. In fact, according to some scholars, "[f]ew have challenged . . . the importance of the family for promoting optimal child development and the belief that services should evolve around and be responsive to the needs of all family members as they relate to the child's development."[33] For example, parental involvement is valuable in developing an educational program for students with behavioral disabilities. Students with these disabilities often receive inadequate or inappropriate education because of their teachers' attitudes about behavioral disabilities generally or because of the school and teachers' lack of personal knowledge about the students' needs. The input of parents assists in determining whether aversive procedures or positive behavior modification techniques should be incorporated into a student's individualized education program.[34] In extreme cases, parental involvement serves as an intervention to prevent or end physical, psychological, or emotional abuse of a student within the school.[35]

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[28] *See id.* § 682(b) (1997).

[29] *Id.* § *685(a) (1997).*

[30] DOEd, Official Response to U.S. Commission on Civil Rights' Request for Information, Feb. 1, 1996, attachment II.A.7 (U.S. Department of Education, Office of Special Education Programs, "OSEP Technical Assistance & Dissemination Projects").

[31] Pub. L. No. 105–17, § 632(b)(3) (1997).

[32] *Id.* § 632(4)(E)(i).

An important factor that precedes parental involvement in the education of children with disabilities is knowledge of the educational system, the services available to students with disabilities, and the rights accorded in laws and regulations to protect students and their parents. With knowledge, parents will understand how they can become involved in their children's education and how to exercise the rights afforded them through IDEA Part B and the IDEA Part B and section 504 regulations. As evident by the Federal programs and provisions that exist, Congress and DOEd intended to ensure that parents could obtain knowledge about special education services and the process for providing those services. Congress and DOEd placed a duty on school systems to notify parents of important processes involved in educating students with disabilities. In addition, they created programs making resources available to parents to enhance knowledge on their children's disabilities, the identification and evaluation processes, the services available to students with disabilities, and innovative and successful practices in serving the needs of the disabled.

Despite the importance placed on parental involvement in Federal law, programs, and policy and in educational literature, the reality for many parents of students with disabilities is relatively limited opportunity for participation in the education of their children. For example, one 3-year study on African American parents' involvement in special education found that "[t]he main vehicle for parental advocacy in special education [was] formal conferences held at prespecified periods. . . Over the course of 3 years, as parents perceived classroom teachers as increasingly less accessible, these conferences became crucial."[36] The study revealed five aspects of professional behavior that "functioned as active deterrents to parents' participation and advocacy . . ."—(1) late notices and inflexible scheduling of conferences; (2) limited time for conferences; (3) emphasis on documents rather than participation; (4) the use of jargon; and (5) the structure of power.[37]

State and Local Procedures and Guidelines on Parental Involvement

State and local education agencies have taken steps to comply with IDEA Part B and to promote involvement of parents of students with disabilities in their children's education. The following summarizes some of the procedures and guidelines State and local education agencies have developed.

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[33] Joanne Curry Sontag and Robert Schacht, "An Ethnic Comparison of Parent Participation and Information Needs in Early Intervention," *Exceptional Children* (March 1994), p. 422 (citing J.A. Summers, C. Dell-Oliver, A. Turnbull, H.A. Benson, E. Santelli, M. Campbell, and E. Siegel-Causey, "Examining the Individualized Family Service Plan Process: What are Family and Practitioner Preferences?" *Topics in Early Childhood Special Education*, vol. 10 (1990), pp. 78–99).

[34] *See* NCD, *Improving Implementation of the Individuals with Disabilities Education Act*, p. 110 ("Teachers [of students with] serious emotional disorders concentrate on discipline and consequences, instead of modifying the environment, which is what our children need." Comments of Betty Cope, testifying at field hearing on the IDEA in Albuquerque, NM).

[35] *See* ibid., p. 109 ("When Annie was in sixth grade, she was physically abused at school by the teacher and the paraprofessional, as documented by the child abuse and neglect team and the local police department." Comments of Ellen Laurence, testifying at field hearings on the IDEA in Denver, CO).

[36] Harry et al., "Communication Versus Compliance," p. 364.

[37] Ibid.

The Maryland State Department of Education is responsible for ensuring that all local education agencies in the State of Maryland are in full compliance with all Federal requirements of IDEA Part B.[38]

The Maryland State Plan for fiscal years 1991-1993 states that "reasonable efforts" should be made to inform parents of and involve them in the special education decisionmaking process.[39] Efforts include: (a) giving parents "timely notice" of meetings, (b) scheduling meetings at a "mutually agreed time and place," (c) explaining the parents' rights, (d) providing parents with written information on placement procedures and due process, and (e) arranging for interpreters for the parent who is deaf and/or whose native language is not English.[40] In carrying out these responsibilities, local education agencies in Maryland can send general delivery and certified letters to parents, make telephone calls to parents, or visit the parents.[41] The plan also states that the parents and the student, as appropriate, are to be notified at least 10 days before an Admission, Review, and Dismissal Committee meeting convenes. The Admission, Review, and Dismissal Committee, which exists in every Maryland school district, screens children for possible disabilities.[42] The Admission, Review, and Dismissal Committee also is responsible for the evaluation and review of placement decisions.[43] The Admission, Review, and Dismissal Committee is to include individuals familiar with the student's level of functioning. The State regulations specify that parents be given "equal participation" at Committee meetings and that parents and students should be encouraged to participate in these meetings, especially the meeting where the IEP is developed.[44]

In 1992, all of the local education agencies in Maryland received a copy of the State agency's document, *Procedural Safeguards: Parental Rights*, which had been reviewed by the U.S. Department of Education's Office of Special Education Programs (OSEP). This document provides guidance to the local school districts on parental notice and procedural requirements for parents with children in special education, and highlights those procedures required by OSEP.[45]

A member of the Prince Georges County (Maryland) Public Schools' Board of Education told the Commission that "parental participation" is one of the key components in the special education process.[46] The Prince Georges County Public Schools' initiatives to include parents in the special education program are guided by the regulations and procedures published by the Maryland State Department of Special Education.[47] Every parent with a child in special education is informed of the procedural safeguards and their rights. They are informed about whom they can contact if they have a problem.[48] The district's Director of Special Education described this information as the Prince Georges County Public Schools' first line of defense in ensuring civil rights compliance.[49]

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[38] Bonnie S. Copeland, Acting State Superintendent of Schools, Maryland State Department of Education, memorandum to Superintendent of Schools, "Compliance with Part B of Individuals with Disabilities Education Act (IDEA)," July 1, 1991, p. 1. *See also* Md. Code Ann., Educ. §§ 2–106. 2–205(g), and 8–401 through 8–416 (1996).

[39] *See* William Tyrrell, Division of Assistance to States, Office of Special Education Programs, DOEd, memorandum to Richard Steinke, Assistant State Superintendent, and Vira Froehlinger, Maryland State Department of Education, "Status of Maryland State Plan for Fiscal Years 1991–1993," attachment 2, Aug. 5, 1990, p. 9, submitted as part of the Maryland State Department of Education's response to the U.S. Commission on Civil Rights Informational Request to State Education Agencies, Dec. 14, 1995, OCRE files, "SPED Response to Info. Request, Q. 10" (hereafter cited as Tyrrell memorandum).

[40] Tyrrell memorandum, attachment 2, pp. 9, 23–29.

[41] Ibid., attachment 2, p. 9.

[42] Robert Coombs, Director of Special Education, Prince Georges County Public Schools, and Lexa Comstock, Compliance and Due Process, Office of Special Education, interview in Prince Georges County, MD, Apr. 11, 1996, pp. 3–4 (hereafter cited as Coombs interview).

[43] Prince Georges County Public Schools, Department of Special Education, *Handbook of Administrative Procedures*, FY 94 Edition (September 1993), pp. 10–11.

[44] Tyrell memorandum, attachment 2, pp. 11, 14–15, and 23.

[45] Richard J. Steinke, Assistant State Superintendent, Maryland State Department of Education, memorandum, Local Directors of Special Education and State Operated Programs, "Parental Rights Booklet—Procedural Safeguards," Jan. 22, 1992, p. 1.

According to a Prince Georges County Public Schools certified school psychologist, screening of applicants for special education can be requested by any concerned person, including parents.[50] Schools are required to schedule a screening so that parents can attend the screening if they wish. However, the psychologist noted that the screening committee usually obtains parental permission for an assessment.[51] For example, the psychologist said often the parents' initial reaction to the assessment which is performed by the Admission, Review, and Dismissal Committee is "denial and resistance."[52] The Admission, Review, and Dismissal Committee must take into account the educational level of the parents in discussing their child with them.[53] The committee tries to work with parents at their level to ensure that they are comfortable with the assessment results. There is no indication that parents must be involved in the assessment process. The persons who make assessments must be "certified and qualified to do so."[54] This may limit parental participation, especially if the parents feel that they are not qualified or their suggestions are not welcomed by the committee.

In 1996, the Supervisor of Special Education for the St. Marys County (Maryland) Public Schools indicated that the day-to-day operation of the special education program is the responsibility of the principals and teachers.[55] The district has three special education coordinators who coordinate activities with the parents.[56] However, the supervisor admitted that she knows very little about what these activities are or what parental involvement means. Most of the special education outreach that *she* conducts is on section 504, primarily for informing classroom teachers about interpretations in section 504 rules and regulations.[57]

The St. Marys County public school system has two major committees involved with the special education program at each school: the Admission, Review, and Dismissal Committee and the Citizens Advisory Committee. The Admission, Review, and Dismissal Committee includes the principal or assistant principal, a special education coordinator, a guidance counselor, and a school psychologist. Its responsibilities include receiving referrals, developing, modifying, and approving the IEP, and recommending dismissal of a child from special education. There is no mention of parental involvement with this committee.[58] Parents are informed of graduation requirements and progress of their child towards meeting these requirements, and they are notified of the availability of extended year services for children with disabilities.[59] The children's IEP progress reports are reviewed almost quarterly. Special education teachers evaluate the IEPs and communicate their findings to the parents.[60] The supervisor requires parental approval to remove a student from a classroom or place a child into a regular classroom.[61] Parents are not involved in the actual evaluation or reassessment process.[62]

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[46] Thomas R. Hendershot, member, Board of Education, Prince Georges County Public Schools, interview, May 28, 1996.

[47] *See* Prince Georges County Public Schools, Department of Special Education, *Handbook of Administrative Procedures. FY 94 Edition* (September 1993).

[48] Coombs interview, p. 2.

[49] Ibid.

[50] Jacqueline K. Hales, Certified School Psychologist, Office of Special Education, Prince Georges County Public Schools, interview in Prince Georges County, MD, Apr. 11, 1996, pp. 1–2 (hereafter cited as Hales interview).

[51] Ibid., p. 2.

[52] Ibid.

[53] Ibid.

[54] Ibid.

[55] *See* Marilyn Beach, Supervisor of Special Education, St. Marys County Public Schools, interview in St. Marys County, MD, May 8, 1996, p. 5 (hereafter cited as Beach interview).

[56] *See* ibid., p. 1.

[57] *See* ibid., pp. 3–5.

The Citizens Advisory Committee for Special Education is appointed by the board of education to provide advice to school officials on the special education program. It includes representatives from community and advocacy organizations.[63] The supervisor indicated that although parents of students with disabilities receive communications from the committee inviting comments and suggestions, the level of contact between parents and the committee ranges from informal to formal, and depends upon the length of time the parent can spend working with the committee.[64] One parent who is active in the special education area in the county recommends a Parent Information Support Center located in the schools to provide information and services to parents of children who have disabilities.[65] She said that a center can better serve the parents than the present structure which makes the amount of information for and support from parents dependent upon their involvement with the Citizens Advisory Committee.[66]

In the North Carolina State Plan for fiscal years 1993–1995, parental notification and involvement provisions are discussed in the individualized education program section.[67] A child's parents or guardians must be involved in the development and writing of the IEP.[68] The section outlines some responsibilities of the local education agencies to ensure involvement of parents or guardians in the IEP process. Some of the responsibilities include:

(1) Notifying parents "early enough" to ensure that they will have the opportunity to partici-

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[58] *See* St. Marys County Public Schools, *Special Education Administration Handbook* (undated document), app. A, Abbreviations and Definitions, p. 1. The committee is comprised of individuals familiar with the student's level of intensity, a special educator and interdisciplinary personnel from public agencies, the local health department, and other agencies. Ibid. (hereafter cited as St. Marys County *Special Education Administration Handbook*).

[59] Ibid., chap. VI–1–9, app. A.

[60] Beach interview, p. 4.

[61] Ibid.

[62] Ibid.

[63] Ibid.

[64] Ibid.

[65] Cheryl Blazer, member and parent, Citizen's Advisory Committee, St. Marys County Public Schools, interview in St. Marys County, MD, May 20, 1996 (hereafter cited as Blazer interview).

[66] Ibid.

[67] North Carolina Division of Exceptional Children's Services, Department of Public Instruction, *North Carolina State Plan for Fiscal Years 1993–1995 Under Title VI, Part B, Education of the Handicapped Act as amended by P.L. 94–142, P.L. 99–457, P.L. 101–476 and P.L. 102–119: A Three Year Plan* (December 1994), sec. 612(4), p. IV–1 (hereafter cited as *North Carolina Three Year Plan*).

[68] Ibid., p. IV–2.

pate, and scheduling meetings at a mutually agreed time and place;

(2) Informing parents of the purpose, time, location, and those who will attend the meetings;

(3) Using other methods, such as individual or conference calls, to involve those parents who cannot attend the meetings;

(4) Keeping records of attempts to arrange a mutually agreed time and place, particularly if the local education agency (LEA) is unable to convince the parents that they should attend (Records include telephone calls made and the results of those calls, copies of correspondence to the parent and any responses received, and visits made to the home or place of employment and the results of those visits.);

(5) Making certain that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.[69]

The parent or guardian also should be included in the review process of the IEP.[70]

The Charlotte-Mecklenburg (North Carolina) school district publishes a procedural manual that includes parental rights under section 504, as well as regulations and procedures to promote the involvement of parents in section 504 special education programs.[71] However, the amount or extent of the parental involvement in special education is unknown. There is one special education committee, the school-based committee, that must include parents. A usual composition of the committee is the school principal, the child's regular education teacher, one of the exceptional children's coordinating teachers, a special education teacher, and the child's parents.[72] The committee receives referrals and initiates screening and evaluation procedures after receipt of parental consent.[73] Two of the committee's responsibilities include: involving parents in the planning process by informing them in writing of a pending evaluation process that diagnoses their child's educational needs, requesting their consent for a comprehensive evaluation,[74] and "inviting" parents to participate on a committee (which the school-based committee convenes) that develops the IEP.[75]

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[69] Ibid., p. IV–5.

[70] Ibid.

[71] *See* Charlotte-Mecklenburg Public Schools, *Section 504 of the Rehabilitation Act of 1973 As Applied to Students: A Procedural Manual* (August 1995), pp. 7, 16 (hereafter cited as Charlotte-Mecklenburg Public Schools, *Section 504*); Frank E. Gadsen, Director, Section 504, Charlotte-Mecklenburg Public Schools, interview in Charlotte, NC, May 8, 1996, p. 4; Charlotte-Mecklenburg Public Schools, *Local Procedures Manual*, "Assistance Team" Section, p. 1. In Charlotte-Mecklenburg, parents must be notified if their child is eligible for special education services, have the right to be informed of evaluations and reevaluations of their child before significant changes in placement take place, and review relevant educational records relative to their child. They also have the right to request an informal conference with the principal and the Learning Assistance Team/Student Services Management Team, which usually does not include parents. Ibid.

[72] Jane Rhyne, Coordinating Director, Programs for Exceptional Children, Charlotte-Mecklenburg Schools, interview, May 10, 1996, p. 3.

[73] Charlotte-Mecklenburg Public Schools Response, Book 2, app. L–2, North Carolina Department of Public Instruction, Division of Exceptional Children's Services, *Procedures Governing Programs and Services for Children with Special Needs* (1993), p. 16 (hereafter cited as NCDPI, *Special Needs*).

[74] Ibid.

[75] Ibid. The IEP meetings require that parents and school personnel jointly make decisions about the child's educational program. Parents are supposed to be equal participants, jointly deciding what the child's needs are, what services will be provided to meet those needs, and what the anticipated outcomes may be. Charlotte-Mecklenburg Public Schools, *Local Procedures Manual*, "Development of an IEP" Section, pp. 1–2.

Parents are not mandated to serve on the student assistance/student services management teams, which include regular educators, counselors, school psychologists and nurses, and social workers. After referring students to the school-based committee, among other responsibilities, the teams develop education programs, oversee the implementation of accommodation plans, and monitor the progress of students. The school system has minimal requirements for a team's composition.[76]

The transition team must include all of the members of the IEP committee, including a students' parents or guardians. The parents' role includes assisting in seeking services of other providers and seeking information on transition through workshops, books, or visits to local agencies.[77]

In Washington State, the special education provisions include only one section on parental involvement.[78] It simply states that "School districts are strongly encouraged to provide parental training in the care and education of the children and to involve parents in the classroom."[79] Administrative responsibility only requires that the Superintendent of Public Instruction provide, upon request, parents or guardians of "handicapped children" information on "handicapped" programs offered within the State.[80] In Washington, the very general provisions on parental involvement may not offer sufficient guidance to assist local education agencies in effectively promoting parental involvement in special education, especially in those areas where there is a large language minority population.

The problems of language minorities in special education also are addressed in the Seattle, Washington, public schools. Although parental involvement in special education is stressed in Seattle,[81] members of Seattle's community with limited-English-speaking skills are "cautiously optimistic" about whether the school district provides adequate special education services for limited-English-proficient students.[82] The director of a Hispanic community organization, El Centro De La Raza, said that many minority parents noted improvements in their children's behavior when they participated.[83]

The Seattle public schools' Director of Special Education confirmed a need to improve the involvement of parents of language minority children who are disabled.[84] The director explained that although the majority of parents of disabled children participated actively in their children's education and were effective lobbyists for their children, poorer parents less proficient in English were not as active in the special education of their children. To enhance their involvement, the director planned to conduct more "open houses" in special education and provide interpreters for parents less proficient in English.[85]

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[76] Charlotte-Mecklenburg Public Schools, Book 2, app. L–3, *Local Procedures Manual*, "Assistance Team" Section, p. 1.

[77] Charlotte-Mecklenburg Schools, Exceptional Children's Department, *Little Book with Big Answers on Compliance Issues*, "IEP/Transition Plan Writing" (hereafter cited as Charlotte-Mecklenburg Schools, *Little Book*).

[78] Judith A. Billings, Superintendent of Public Instruction, Olympia, WA, *Common School Manual 1995*, Common School Laws of the State of Washington, Title 28A of the Revised Code of Washington (RCW), Common School Provisions, Chapter 28A.155, Special Education, RCW 28A.155.020, Administrative section or unit for the education of children with handicapping conditions—"handicapped children" and "appropriate education" defined—Approval when child under jurisdiction of juvenile court, p. 1 (hereafter cited as Washington State, *Common School Manual*).

[79] Ibid.

[80] Ibid., p. 3.

[81] Froysene Mesendick, Director of Special Education, Seattle Public Schools, interview in Seattle, WA, Mar. 28, 1996 (hereafter cited as Mesendick interview). The Seattle Public Schools has a Special Education Advisory and Advocacy Committee that provides information, guidance, and advice on special education programs, and provides a publication by the Department of Education on the procedures regarding parental notice, due process, and complaint filing. *See* Seattle Public Schools, *Celebrating 125 Years of Putting Students First* (1995), p. 15; DOEd, Office of Special Education Programs, *Procedural Safeguards Due Process for Parents and Children* (Nov. 19, 1995).

[82] Roberto Maestes, Director, El Centro De La Raza, interview in Seattle, WA, Apr. 12, 1996 (hereafter cited as Maestes interview).

[83] Ibid.

[84] Mesendick interview.

In New Mexico's public school system, parental involvement means that parents are involved in the school community. This includes parents chairing committees, attending school board meetings, joining parent-school groups, and, in special education, participating at IEP meetings.[86]

In 1995, the New Mexico State Department of Education released a technical assistance manual for educators and other persons involved in special education to guide them in the IEP process.[87] Chapter 9 of the manual discusses student and parent participation.[88] It includes a statement of the partnership between parents and educators. One of the partnership's three purposes is to create a "system of checks and balances, so that students and parents on the one hand, and educators on the other, can work as partners for the student's education." The manual states that "[P]arents have to be recognized as special educators, the true experts on their children; and professional people—teachers, pediatricians, psychologists, and others—have to learn to be consultants to parents."[89] The manual lists several practices that should be initiated at the local school level to promote parental involvement. These practices include:

- Encouraging collaboration among students, parents, schools, and service agencies;

- Assisting parents to support student self-advocacy and self-determination through the shared decisionmaking process; and

- Empowering parents and developing a model for understanding, encouraging, and achieving parental involvement.[90]

School officials in Albuquerque, New Mexico, prepare and distribute a parents' handbook on special education services.[91] In addition to parent rights, the handbook explains special education procedures and describes the referral, evaluation, and placement procedures. Essentially, the handbook tells parents when they will be notified during the different phases, what happens to the child during each phase, and who is involved.[92] Parents are invited to participate on committees or teams, as well as attend IEP meetings.[93] However, these teams or committees *may* include parents.[94] It does not appear that parental participation is required.

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[85] Ibid.

[86] In New Mexico, the IEP process is viewed as the major catalyst to bring together parents, students, school personnel, and students in making decisions about the educational program for students eligible for special education services. The IEP serves as the primary communication instrument between parents and school personnel. The IEP process, through meetings, is supposed to provide the opportunity to resolve any differences between parents and the school concerning the special educational needs of a student. New Mexico State Department of Education, *A Practical Guide for IEP Members, Chapter 9: Student and Parent Participation* (December 1995), pp. 3–4, 48, 50–54 (hereafter cited as NMSDE, *A Practical Guide*).

[87] *See* ibid.

[88] Ibid., chap. 9, pp. 47–54.

[89] Ibid., chap. 9, p. 47.

[90] Ibid.

[91] Albuquerque Public Schools, *Parent Handbook: Involved Parents Make Education Work—Special Education Services in Albuquerque Public Schools* (no date).

[92] *See* ibid., p. 2.

[93] Ibid., pp. 1–8.

The handbook states that parental involvement is an integral part of special education, and the focus of the involvement is for parents to work with school personnel to "facilitate the growth of the exceptional student."[95] It appears that parents who have questions should contact the child's teacher or other staff at the school level.[96] However, if a parent does not understand the procedures and is uncomfortable about contacting the school, there would be very little school-parent communication.

Parental Views About and Satisfaction with Their Children's Education Programs

Various studies have found that most parents of students receiving special education services are satisfied with the services their children receive. A 1994 study of 21 parents and guardians of third through fifth-grade students who had reading disabilities revealed that all parents were satisfied with the special services their children received.[97] A study conducted in 1988 found that 85 percent to 90 percent of 663 parents of students with mild disabilities were highly satisfied or very satisfied with their children's current special education program. A 1982 study found that of 434 parents of students with various disabilities, 76 percent were satisfied or very satisfied with their children's current special education program. A 1990 study found that 91 percent of 41 parents were satisfied or very satisfied with their children's resource room experience, and a 1983 study found that 6 percent of 43 parents of children with learning disabilities were moderately to very confident that their children's teachers were improving their children's academic and social abilities.[98]

Furthermore, parents of students with disabilities appear to be about as satisfied with their children's educational programs and their own level of parental involvement as parents of children without disabilities. A telephone survey conducted in 1989 and given to a random sample of 1,702 parents in a large, urban, public school system in the midwestern United States determined whether parents of children with disabilities exhibited different opinions toward the education of their children than parents of children with disabilities. The study examined parents' opinions related to parental involvement, quality of instruction, and equality of educational opportunity. Although the study determined that parents of children in special education are more likely to be contacted about their children's education, there were no other significant differences in opinions between the two groups.[99]

In exploring the reasons for the positive attitudes of parents of children with disabilities,

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[94] Ibid., pp. 7–8.

[95] Ibid., p. 18.

[96] Ibid.

[97] Susan Green and Mark R. Shinn, "Parent Attitudes About Special Education and Reintegration: What is the Role of Student Outcomes?" *Exceptional Children*, vol. 61 (December 1994), p. 269 (hereafter cited as Green and Shinn, "Parent Attitudes About Special Education").

[98] Ibid. (describing other studies) (citing Y. Leyser, "Let's Listen to the Consumer: The Voice of Parents of Exceptional Children," *The School Counselor*, vol. 35 (1988), pp. 363–69; E.W. Lynch and R. Stein, "Perspectives on Parent Participation in Special Education," *Exceptional Education Quarterly*, vol. 3, no. 2 (1982), pp. 56–63) (hereafter cited as Lynch and Stein, "Parent Participation"); S. Lowenbraum, S. Madge, and J. Affleck, "Parental Satisfaction with Integrated Class Placements of Special Education and General Education Students," *Remedial and Special Education*, vol. 11, no. 4 (1990); and M. Abramson, V. Wilson, R.K. Yoshida, and G. Hagerty, "Parents' Perceptions of their Learning Disabled Child's Educational Performance," *Learning Disability Quarterly*, vol. 6, no. 2 (1983), pp. 184–94.).

[99] *See* James Yanok and Diane Derubetis, "Comparative Study of Parental Participation in Regular and Special Education Programs," *Exceptional Children*, vol. 56, no. 3 (November 1989), p. 195 (hereafter cited as Yanok and Derubetis, "Comparative Study of Parental Participation").

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one study found that a child's improved achievement outcomes were not the basis for parent satisfaction. Instead, factors such as individual attention, the characteristics of teachers, and increased self-esteem in their children were a primary reason for parent satisfaction.[100] In the study, 21 parents or guardians of students with reading disabilities were asked what factor was most important to their child's reading success. Over half of those responding mentioned that high self-esteem or the fact that the child enjoys reading was the most important factor.[101]

Parents of children with disabilities would like more information than they currently receive about their children's education and experiences.[102] One study found that nearly three-quarters of parents interviewed did not recall discussing, at the time their child was found eligible for special education, the ultimate goals of their child's education program or the exit criteria that would be used in determining when the child no longer needed special education services.[103] That study also found that the legal standards for determining when an education was "appropriate" or when a student was achieving satisfactorily in the regular class were "very unfamiliar" to some of the parents.[104]

In general, minority parents tend to have less positive attitudes towards their children's educational programs than other parents of children with disabilities.[105] For example, although African American parents traditionally are supportive and cognizant of the importance of education, many have developed a distrustful attitude towards education in general and special education in particular, because of their negative experiences with school desegregation.[106] This mistrust in special education is intensified because of the overrepresentation and overclassification of minority students in such programs.[107]

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[100] Green and Shinn, "Parent Attitudes About Special Education," p. 269.

[101] Ibid.

[102] *See* ibid. (citing Y. Leyser, "Let's Listen to the Consumer: The Voice of Parents of Exceptional Children," *The School Counselor*, vol. 35 (1988), pp. 363–69; Martin A. Kotler, "The Individuals with Disabilities Education Act: A Parent's Perspective and Proposal for Change," *Univerity of Michigan Journal of Law Reform*, vol. 27, no. 2 (Winter 1994) p. 362; Linda Davern, "Listening to Parents of Children with Disabilities," *Educational Leadership* (April 1996), pp. 61–63; Jon Glass, "Rules Jargon & Experts Can Overwhelm Parents," *The Virginian-Pilot* (Norfolk), Sept. 17, 1995, p. A13; Jon Glass, "Mom Fights to Define Son's Needs; When Parents and School Officials Disagree on What's Best for a Child, Allies Can Become Enemies," *The Virginian-Pilot* (Norfolk), Sept. 17, 1995, p. A12; Jacquelynne S. Eccles and Rena D. Harold, "Parent-School Involvement during the Early Adolescent Years," *Teachers College Record*, vol. 94, no. 3 (Spring 1993), pp. 2–4, 9–10.

[103] Green and Shinn, "Parent Attitudes About Special Education," p. 269. A majority of parents in Green and Shinn's study wanted to know their child's standing compared to other students in their child's regular class. Green and Shinn note that one study found that a number of parents were unhappy about the information they were provided and that 85 percent expressed a desire to obtain information about their children's academic progress. Ibid. (citing Y. Leyser, "Let's Listen to the Consumer: The Voice of Parents of Exceptional Children," *The School Counselor*, vol. 35 (1988), pp. 363–69).

[104] Ibid.

[105] *See* Ruth E. Dennis and Michael F. Giangreco, "Creating Conversation: Reflections on Cultural Sensitivity in Family Interviewing," *Exceptional Children*, vol. 63, no. 1 (1996), pp. 103–04; Susan L. Dauber and Joyce L. Epstein, "Parents' Attitudes and Practices of Involvement in Inner-City Elementary and Middle Schools," in N. F. Chavkin, ed., *Families and Schools in a Pluralistic Society* (Albany, NY: State University of New York Press, 1993), pp. 53–56; *see also* Maestes interview. Maestes, the director of a Hispanic community organization in Seattle, indicated that members of Seattle's community with limited English-speaking skills are "cautiously optimistic" about the school district's providing adequate special education services for limited-English-proficient students. However, he said that many of these parents sense that they are not welcome by school officials, and, therefore, their participation is minimal. Ibid.

[106] *See* Beth Harry, "Restructuring the Participation of African-American Parents in Special Education: Issues in the Education of African-American Youth in Special Education Settings," *Exceptional Education*, vol. 59, no. 2 (1992), pp. 123–36 (hereafter cited as "Restructuring the Participation"); Diana T. Slaughter and Valerie Shahaiw Kuehne, "Improving Black Education: Perspectives on Parent Involvement," in Willy De Marcell Smith and Eva Wells Chun, eds., *Black Education: A Quest for Equity and Excellence* (New Brunswick, NJ: Transaction Publ., 1989), p. 60; "Teaching Inequality: The Problem of Public

A study of some African American parents' involvement in special education found that these parents of children in special education programs viewed the goal of preschool special education classes as offering the child "a chance to 'catch up.'"[108] Over the course of the 3-year study, however, this view often "evolved into disillusionment." Parents attributed three aspects of the educational program to their disillusionment: (1) age-inappropriate peer groups in self-contained classes, such as placing a 6-year-old child with children up to 11 years old; (2) the apparent isolation of special education programs from regular education; and (3) parents' growing perception that the label 'mental retardation' was being used for their child."[109]

Notification to Parents

Federal law and regulations emphasize the importance of parental notice in the education of children with disabilities.[110] For example, IDEA Part B regulations require a school district to notify parents of the IEP meeting early enough to ensure that they will have an opportunity to attend.[111] The notice must indicate the purpose, time, and location of the meeting and specify the individuals who will attend.[112] Before initiating the assessment, a school must notify the parents of the proposed assessment.[113] If a parent wishes to have his or her child evaluated but school personnel do not feel the child has a disability, the school may refuse to assess the child, but it must inform the parents in writing of the reasons for refusal. If the parents still feel that the child should be assessed, they may request a due process hearing where they have the opportunity to show why their child should be evaluated.

At field hearings on the IDEA sponsored by the National Council on Disability, some parents testified that they did not receive notice of IEP meetings.[114] A 3-year study on African American parents' involvement in special education found that many of the parents involved in the study received late notices of IEP conferences. That study noted, "Despite the state's requirement for 10 days' prior notice to parents, there were occasions on which parents reported receipt of the notice 2 or 3 days prior, and in two cases, on the day of the meeting."[115] Another study found that notification and communication between schools and minority (in the case of the study, Puerto Rican) parents of children with disabilities tended

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School Tracking," *Harvard Law Review*, vol. 102 (1989) p. 1330; *see also* Adrian T. Bennett, "Gateways to Powerlessness: Incorporating Hispanic Deaf Children and Families Into Formal Schooling," *Disability, Handicap and Society*, vol. 3, no. 2 (1988), p. 150; James M. Patton and Ronald L. Braithwaite, "Obstacles to the Participation of Black Parents in the Educational Programs of their Handicapped Children," *Centering Teacher Education* (August 1984), p. 36 (hereafter cited as Patton and Braithwaite, "Obstacles to the Participation").

[107] Harry, "Restructuring the Participation," pp. 124–25; Beth Harry, "Making Sense of Disability: Low-Income, Puerto Rican Parents' Theories of the Problem," *Exceptional Children*, vol. 59, no. 1 (September 1992), p. 30 (hereafter cited as Harry, "Making Sense of a Disability"); Beth Harry, *Cultural Diversity, Families, and the Special Education System: Communication and Empowerment* (N.Y.: Teachers College, Columbia University, 1992), pp. 4, 52–53, 59, 61–66 (hereafter cited as Harry, *Cultural Diversity*).

[108] Harry et al., "Communication Versus Compliance," p. 364.

[109] Ibid.

[110] *See* pp. 234–36 above.

[111] 34 C.F.R. § 300.345(a)(1) (1996).

[112] *Id. § 300.345(b)(1).*

[113] *See* Pub. L. No. 105–17, § 615(b) (1997); 34 C.F.R. § 300.504(b) (1996); 34 C.F.R. § 104.36 (1996).

[114] NCD, *Improving Implementation of the Individuals with Disabilities Education Act*, p. 58.

[115] Harry et al., "Communication Versus Compliance," p. 364.

to be formal and impersonal, with emphasis on written materials. The result was that these parents remained uninformed and alienated from their child's IEP process.[116]

Other research suggests that considering "cultural sensitivity" in special education requires school personnel to consider extra efforts and approaches to notify and involve minority parents of disabled children:[117]

> The federal rules and regulations of special education . . . were developed primarily in the context of traditional, white middle class, western assumptions and ideals. These assumptions may not be consistent with the values and beliefs of some families and children the regulations are intended to serve. Special educators are, therefore, challenged to explore flexible and culturally sensitive approaches to working with families in ways that can enhance effective communication, build trusting relationships, and open the doors for important family involvement. "Cultural sensitivity" is a term used to describe an awareness and appreciation of the multiple factors that may influence the values and perspectives of individual families and children.[118]

Traditionally, some special educators have not wanted to meet the challenges necessary to involve minority parents.[119] However, some special educators and other professionals are beginning to address the challenges of working with culturally diverse families and are expanding their professional training and using their experiences, as well as available programs, to develop different approaches in bringing families of different backgrounds and cultures into special education.[120]

Parental Notice: OCR's Enforcement Efforts

Two provisions in the section 504 regulations require parental notice with respect to the elementary and secondary education of persons with disabilities. Section 104.32(b) requires a recipient school district to "[t]ake appropriate steps to notify" persons with disabilities and their parents or guardians of its responsibilities under section 504 to provide a free appropriate public education.[121] Section 104.36 requires a school district to provide parents or guardians of students with disabilities with notice before the school district begins taking action to identify students as having disabilities, to evaluate students and their needs for special education and related services, or to begin or change the placement of students with disabilities.[122] The regulations do not specify the manner in which a school district must provide notice, although compliance with the procedural safeguards requirement of the IDEA Part B is one means of meeting the section 504 notice requirement.[123] In addition, the IDEA Part B standard on procedural safeguards is recommended as a model for section 504 compliance.[124] A 1993 OCR policy letter discusses the section 104.32 notice requirement as it applies to private schools. The letter indicates that "[t]here are many means available [to provide notice] including notices to private schools, state and local agencies, and notices placed in newspapers."[125]

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[116] *See* Harry, *Cultural Diversity*, pp. 164–85; Harry, "Restructuring the Participation," p. 123.

[117] Ruth E. Dennis and Michael F. Giangreco, "Creating Conversation: Reflections on Cultural Sensitivity in Family Interviewing," *Exceptional Children*, vol. 63, no. 1 (1996), p. 104 (hereafter cited as Dennis and Giangreco, "Creating Conversation").

[118] Ibid. (citing S. Speight, L. Myers, C. Cox and P. Highlen, "A Redefinition of Multicultural Counseling," *Journal of Counseling and Development*, vol. 70 (1991), pp. 29–36). *See also* Kotler, "The Individuals with Disabilities Education Act," p. 362.

[119] *See* Harry et al., "Communication Versus Compliance," p. 364; Harry, *Cultural Diversity*, pp. 164–85; Harry, "Restructuring the Participation," p. 123.

[120] Dennis and Giangreco, "Creating Conversation," p. 104.

[121] 34 C.F.R. § 104.32(b) (1996).

[122] *See id.* § 104.36 & pt. 104, app. A, subpt. D, no. 25 (1996).

[123] *See id.*, § 104.36 (1996). The section 504 regulations, as originally proposed, made compliance with the IDEA, then the EHA, the only standard for compliance. However, the provision was revised in the final issuance of the rulemaking. OCR noted that "[b]ecause the due process procedures of the EHA . . . are inappropriate for some recipients not subject to that Act, the section now specifies minimum procedures." *Id.*, pt. 104, app. A, subpt. D, no. 25 (1996).

[124] 34 C.F.R. pt. 104, app. A, subpt. D, no. 25 (1996).

In determining whether notice was provided, OCR has reviewed student files to identify whether there is documentation of attempts to notify the parent.[126] Where there is documentation of parental notice, OCR also has considered whether notice was provided in a timely fashion. For example, in one case OCR determined that a school district had violated section 104.36 when OCR found that 12 of the 24 student files it reviewed showed that parents had been notified of IEP placement committee meetings and 6 of those 12 contained irregularities in timeliness of notifications. In addition, the files of two students showed that their placement committee meetings were held without a parent, and there was no information in those files documenting the school district's attempts to contact the parents as required by State policy.[127]

In determining whether the notice required by section 104.36 is adequate, OCR has considered whether it informs parents of all the rights specified in § 104.36: (1) an opportunity for the parents or guardian to examine relevant records, (2) an impartial hearing with the opportunity for participation by the parents or guardian and representation by counsel, and (3) a review procedure. When a notice has lacked any or all of this information, OCR has found that it did not comply with the requirements of section 104.36.[128]

OCR also incorporates parental notice in remedies and resolutions to cases. According to OCR policy, parental notice, including notice to parent organizations, can be incorporated as remedies in a case when OCR has found violations in a school district's referral of students for special education evaluations or in its evaluation and placement of students.[129]

In providing outreach and education, OCR has taken a number of steps to ensure that parents are aware of the rights and requirements of section 504. OCR has produced pamphlets outlining school districts' responsibilities under section 504 and the protections afforded parents through notice requirements, the right to examine their child's records, and due process procedures.[130] In 1990, OCR undertook a special initiative to focus outreach and education on children whose families are homeless and children who are born to drug-addicted mothers and the fact these groups may include children who have disabilities. To ensure that these children and their parents or guardians were reached, OCR requested the chief State school officer in each State to bring to the attention of school districts the section 504 requirements to (1) identify and locate each person in a district's jurisdiction who was not receiving public education, and (2) provide notice of the district's section 504 responsibilities.[131]

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[125] Jean P. Peelen, Director, Elementary and Secondary Education Policy Division, Office for Civil Rights (OCR), DOEd, letter to Carole Veir, TACHO President, Texas Association of Section 504 Coordinators & Hearing Officers, Dec. 1, 1993, p. 3 (response to question no. 3), *reprinted from* OCR electronic library file no. HQ951274.PDC.

[126] *See, e.g.*, Jesse L. High, Acting Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Billy Salter, Interim Superintendent, Mobile County School District, Mobile, AL, re: Complaint No. 04–86–1191, Nov. 17, 1986, *reprinted in* 352 EHLR 348 (hereafter cited as OCR, Complaint No. 04–86–1191, 352 EHLR 348); Jesse L. High, Acting Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Thomas Trail, Superintendent, Eldon R–I School District, Eldon, MO, re: Complaint No. 07–85–1168, Jan. 16, 1986, *reprinted in* 352 EHLR 144, 145–46 (hereafter cited as OCR, Complaint No. 07–85–1168, 352 EHLR 144).

[127] *See* OCR, Complaint No. 04–86–1191, 352 EHLR 348.

[128] *See* Judith E. Banks, Regional Civil Rights Director, OCR, Region VII, DOEd, letter to Robert Buchanan, Superintendent, Sikeston R–VI School District, Sikeston, MO, re: Complaint No. 07–89–1111, *reprinted in* 16 EHLR 351, 354; OCR, Complaint No. 07–85–1168, 352 EHLR 144, 147; Linda A. McGovern, Acting Regional Director, OCR, Region V, DOEd, letter to Richard Wiggall, Superintendent, Elgin School District U–46, Elgin, IL, re: Complaint No. 05–83–1116, July 31, 1985, *reprinted in* 352 EHLR 130, 142.

[129] Norma Cantú, Assistant Secretary for Civil Rights, OCR, DOEd, memorandum to All Staff, "Minority Students and Special Education," July 6, 1995, pp. 9, 13, Policy Codification Document No. 00291.

[130] *See* DOEd, OCR, *The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973* (1995); DOEd, OCR, *Free Appropriate Public Education for Students With Handicaps* (1992); and DOED, OCR, *The Rights of Individuals with Handicaps Under Federal Law: Information for Those Who Have Rights and Responsibilities Under Section 504 of the Rehabilitation Act of 1973* (1992).

Parental Involvement

> "Parents are meant to play an important role as advocates for their children in the special education process."[132]

> "Increased parent involvement is associated with more positive parental attitudes toward teachers and schools, more positive student attitudes and behaviors, improvements in student performance, improved teacher morale, and enriched school climates."[133]

IDEA Part B regulations also require school districts to involve parents in developing their child's individualized educational program. Each school system should take steps to ensure that one or both parents are present at the IEP meeting or are afforded the opportunity to participate.[134] The school system should schedule the IEP meeting at a mutually agreed on time and place.[135] If neither parent can attend the meeting, the school district should use other methods to ensure participation, including individual or conference telephone calls.[136] Some school systems have taken other initiatives, such as providing parents with transportation to IEP meetings.[137] The school system can conduct a meeting without a parent's attendance, although Federal regulations require a record of the school system's attempts to arrange a mutually agreed on time and place. The record may consist of (1) detailed records of telephone calls made or attempted and the results of those calls; (2) copies of correspondence sent to parents and any responses received; or (3) detailed records of visits made to the parent's home or place of employment and the results of those visits.[138]

The school district should take whatever action is necessary to ensure that the parent understands the proceedings at the meeting. If necessary, the school district should arrange for an interpreter for parents with deafness or whose native language is other than English.[139] Appendix C to the IDEA Part B regulations clarifies that it is not permissible for school districts to present a completed IEP to parents for their approval before there has been a full discussion with the parents of their child's need for special education and related services and what services the school district will provide to the child. It further states:

> It would be appropriate for agency staff to come prepared with evaluation findings, statements of present levels of educational performance, and a recommendation regarding annual goals, short term instructional objectives, and the kind of special education and related services to be provided. However, the agency

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[131] Michael L. Williams, Assistant Secretary for Civil Rights, DOEd, memorandum to Chief State School Officers, Oct. 15, 1990, *reprinted from* OCR's electronic library file no. HQ951234.PDC.

[132] Green and Shinn, "Parent Attitudes About Special Education," p. 269.

[133] Ardis Sussell, Sue Carr, and Alice Hartman, "Families R Us: Building a Parent/School Partnership," *Teaching Exceptional Children*, vol. 28, no. 4 (Summer 1996), p. 53.

[134] 34 C.F.R. § 300.345(a) (1996).

[135] *Id.* § 300.345(a)(2).

[136] *Id.* § 300.345(c).

[137] *See* Pete Idstein, "Swimming Against the Mainstream," *Phi Delta Kappan* (December 1993), p. 338.

[138] 34 C.F.R. § 300.345(d) (1996).

[139] *Id.* § 300.345(e).

> must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review . . .[140]

After the IEP is completed, the school system should provide a copy to the parents on request.[141] DOEd recommends that school systems inform parents of their right to a copy of the IEP upon request during the IEP meeting and that school systems provide the copy within a reasonable time after the meeting.[142]

In interpreting its IDEA Part B regulations, the U.S. Department of Education describes the role of parents at an IEP meeting:

> The parents of a child with a disability are expected to be equal participants along with school personnel in developing, reviewing, and revising the child's IEP. This is an active role in which the parents (1) participate in the discussion about the child's needs for special education and related services, and (2) join with the other participants in deciding what services the agency will provide to the child.[143]

Extent of Parental Involvement

Although educational research indicates the importance of parental involvement in the education of children with disabilities and the IDEA mandates their participation, some parents are not involved in their child's special educational program.[144] The involvement of minority parents in their children's special education program is lower than that of their white counterparts.[145]

One author reported the findings of several research studies concerning the exclusion of parents from special education processes, even those procedures for parental involvement that are mandated by the IDEA. According to this author:

> Instead of cooperating with parents, educators frequently attempt to manipulate parents into accepting programs formulated in the parents' absence. In fact, studies have shown that, although in theory the IEP is to be developed jointly at the conference, it is almost always developed by the educational agency after a placement decision has been made.[146]

The author states that the reason for the exclusion of parents is twofold. First, there are institutional barriers whereby educational agencies tend to want to "routinize" procedures. Individualized reports are replaced by checklists or boilerplate reports, or broad, general classifications of children and standardized programming.[147] Second, the agencies are not willing to expand or accept changes and set other priorities depending, for example, on available funding.[148]

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[140] *Id.* app. C, no. 55 (1996).

[141] *Id.* § 300.345(f) (1996).

[142] *Id.* pt. 300, app. C, no. 31 (1996).

[143] *Id.* pt. 300, app. C, no. 26 (1996).

[144] *See* Kotler, "The Individuals with Disabilities Education Act," pp. 362–66; Bonnie G. Joyce, "Parental Involvement: A Model for Program Development," *Rural Education Quarterly*, vol. 8, no. 2 (1987), pp. 7–12; "School is What *We* Make It," *Journal of Educational Public Relations*, vol. 9, no. 4 (Spring 1987), pp. 1–8; Epstein, "What Principals Should Know," pp. 6–9; Anne T. Henderson, "Parents Are a School's Best Friends," *Phi Delta Kappan* (October 1988), pp. 148–53; Merle B. Karnes, Susan A. Linne Meyer, and Susan A. Linne Meyer, and Gloria Myles, "Programs for Parents of Handicapped Children," in Ron Haskins and Diane Adams, eds., *Parent Education and Public Policy* (N.J.: ABLEX Co., 1983), p. 242 (hereafter cited as Karnes et al., "Programs for Parents").

[145] Harry, "Restructuring the Participation," p. 123. One author reports that nonwhite and non-English-speaking parents joined white middle class parents of disabled children in fighting exclusion of students with disabilities for regular education programs because too many of their children were being channeled into special education programs. Kotler, "The Individuals with Disabilities Act," p. 362.

[146] Kotler, "The Individuals with Disabilities Education Act," p. 364.

[147] Ibid.

One study reported on fieldwork with parents, children, and educational officials in western New York.[149] The study's author concluded that "[e]ffective parental participation in the IEP conference . . . proved to be the exception rather than the rule."[150] Of the 38 families studied, none had ever participated in a conference.[151] The author of another report noted that some observers of IEP conferences did not find a cooperative interaction between parents and educators, but instead found that conferences tended to be "highly formal, noninteractive, and replete with educational jargon."[152]

Researchers conducting studies on parental participation in IEP meetings have investigated parents' verbal interactions with educators and then interviewed these parents immediately after these conferences to determine their perceptions and knowledge about the issues discussed and decisions determined during the IEP deliberations.[153] In one study of parents' participation in and perceptions of the initial IEP conferences, the investigators found that parents made few comments, asked few questions, and responded infrequently to other participants' questions and comments.[154] Such low levels of verbal participation (and passivity) occurred despite the critical decisions being made: these IEP meetings were the initial placement conferences; presented results of the child's psycho-educational assessment; and decided on significant changes in the child's educational plans.[155]

Further, in field hearings on the IDEA held in October and November 1994, a common theme among parents, teachers, and advocates was that "[i]n spite of provisions mandating parent participation in decision making, parents in many parts of the country still feel largely left out of the process."[156] In fact, "many parents believe that they were not valued as equal participants in the evaluation process."[157] One individual testifying before the hearings noted, "I believe parents come to the IEP meeting as an unequal partner. Our signature means only that we were present at the meeting."[158]

According to several studies, in a large number of school districts parents do not have a decisionmaking role in the special education pro-

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[148] Ibid., pp. 365, 367.

[149] David M. Engel, "Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference," *Duke Law Journal* (1991), pp. 166, 168 (hereafter cited as Engel, "Law, Culture, and Children with Disabilities"). Engel, a law professor at State University of New York at Buffalo, conducted approximately 140 interviews with parents and children over a 15-month period from 1987 to 1988. Engel interviewed approximately 57 families. In most instances, the children with disabilities had cerebral palsy. *Id.*, note 6.

[150] *Id.*, p. 179.

[151] *Id.*, note 72.

[152] See Kotler, "The Individuals with Disabilities Education Act," pp. 363–64.

[153] *See* Vaughn, et al., "Parent Participation in the Initial Placement/IEP Conference," p. 83; R.L. Simpson and C.R. Fiedler, "Parent Participation in Individualized Educational Program Conferences: A Case for Individualization," in M.J. Fine (ed.), *The Second Handbook on Parent Education: Contemporary Perspectives* (New York: Academic Press, 1989), pp. 145–72; Diane Scott-Jones, "Families and Academic Achievement: Risks and Resilience," in M.C. Wang, M. Reynolds, and H. Walberg (eds.), *Handbook of Special Education: Research and Practice*, vol. IV (New York: Pergamon, 1991), pp. 255–67 (hereafter cited as "Families and Academic Achievement").

[154] Vaughn et al., "Parent Participation in the Initial Placement/IEP Conference," p. 87.

[155] Similar results were reported in an earlier study in terms of the number of verbal statements and questions uttered by parents. *See* Goldstein et al., "An Observational Analysis," pp. 278–86.

[156] NCD, *Improving Implementation of the Individuals with Disabilities Education Act*, p. 11.

[157] Ibid., p. 42.

[158] Ibid., p. 57 (comments of Christi Murn at Milwaukee, WI, field hearing).

gram.[159] In 1995, parents who testified at the House Subcommittee on Early Childhood, Youth and Families' reauthorization hearing on the IDEA criticized school districts for failing to include them in decisions involving their children.[160]

Barriers to Parental Involvement

One explanation for limited parental involvement is the existence of barriers that prevent, discourage, or inhibit parents from participating during the IEP meeting and in other aspects of their children's educational development and experiences. Some barriers tend toward objective factors such as procedures or policies of school districts that limit participation by parents. Others are more subjective, such as the attitudes and beliefs held by parents and professionals that influence their interactions in the IEP meeting.

State and Local Discretion

Although DOEd notes that a parent should be an equal participant in the IEP meeting and should join in deciding the appropriate services for the child, schools differ as to the extent they allow parents to participate in decisionmaking. One study revealed that some IEP committees prepared the parent for the IEP meeting through extensive premeeting conferences at which test results and recommendations were discussed. Others withheld information until the IEP meeting. Decisionmaking might occur by consensus or by vote, although some IEP committees made their decisions only after requesting the parent to leave the room.[161]

In one study describing the policies and practices of various school districts in New York State, the researcher found very different administrative approaches to organizing IEP conferences with parents. Some school districts permitted only a few (four or five) educators to be present while others allowed as many as 20 staffers to attend. In some cases, there might be extensive conferences with parents before the actual IEP meeting while in others, valuable information such as test results were withheld from parents until the IEP conference was held.[162]

IDEA Part B regulations forbid school districts to complete the IEP before the IEP meeting begins. This provision ensures that parents have the opportunity to participate in the formulation of the IEP.[163] Despite the prohibition, however, some schools prepare IEPs before meeting with parents,[164] in some cases rendering the meeting a formality.[165]

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[159] Sontag and Schacht, "An Ethnic Comparison," p. 433 (citing J.C. Sontag and E. Sontag, "Parental Choice and Early Intervention: A Proactive Policy of Reform," *The Special Education Leadership Review*, vol. 1, no. 1 (1992)); Eleanor W. Lynch and Robert C. Stein, "Parent Participation by Ethnicity: A Comparison of Hispanic, Black, and Anglo Families," *Exceptional Children*, vol. 54, no. 2 (1987), p. 108 (hereafter cited as Lynch and Stein, "Parent Participation by Ethnicity,"); Karnes et al., "Programs for Parents," p. 184.

[160] "Including Parents," *The Special Educator*, vol. 11, no. 3 (Sept. 1, 1995), p. 1.

[161] Engel, "Law, Culture, and Children with Disabilities," p. 188.

[162] *Id.* This study also illustrated how system barriers can occur due to the absence of public school resources. In one such case described in the study, a child who was academically gifted also had a "seriously debilitating physical injury." The school district's plan was to place the child in a special education classroom while the parents pressed the school authorities for placement in a regular classroom. Essentially, the school admitted that it had no experiences in dealing with "intelligent handicapped children" and eventually placed the child in a regular class with specialized equipment. Ibid., p. 185. In describing the viewpoints of the school officials, the author states: "The assumption [of the school district] appears to be that a child can be *either* intelligent or 'handicapped' but is rarely—if ever—both." *Id.*

[163] Mark C. Weber, *Special Education Law and Litigation Treatise* (1992), p. 5:3 (citing 34 C.F.R. ch. 3, app. C question 55 (1991) and W.G. v. Board of Trustees, 960 F.2d 1479 (9th Cir. 1992)). However, one court overruled the parent's objection to an IEP "proposal" that was drafted 3 weeks before the meeting without the participation of the parents. The court reasoned that the school district did not violate the regulation because it could have modified the proposal at the meeting to finalize the IEP. Weber, *Special Education Law and Litigation Treatise*, p. 5:3 (citing Hudson v. Wilson, 1986–86 EHLR 558:186, 189 (W.D. Va. 1986), *aff'd*, 828 F.2d 1059, 1987–88 EHLR 559:139 (4th Cir. 1987).).

Administrative Barriers

There are many factors in the administrative process of developing IEPs for students with disabilities that have functioned as barriers or deterrents to parent participation and advocacy. For example, one factor has been the process for scheduling conferences or other meetings with parents.[166] One 3-year study of African American parents' involvement in special education found that many parents complained of "the absence of attempts by administrators to consult with parents regarding their availability for conferences and a general reluctance to adjust dates when parents expressed difficulty in meeting the announced date."[167] A second factor has been the limited time allotted to conferences. That same study found that the time allowed for most annual conferences ranged from 20 to 30 minutes. In some cases, schools would follow the time allowance strictly and end deliberations, regardless of the status. School representatives would advise parents to continue discussions with teachers after the meetings.[168]

A third factor serving as an administrative deterrent to parental involvement has been an emphasis on documents rather than participation.[169] For example, in field hearings on the IDEA sponsored by the National Council on Disability, one individual commented:

> In regard to the IEP process itself, I wish it stood for "Individual Encouragement to Parents." If we could change it, I would change it. In many ways this public law has become our enemy. Educators are being consumed by accountability and the IEP process itself. This process is not a true process at all sometimes until due process . . . the reason being minimal parent involvement until it's too late. The IEP process is so labor

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[164] Engel's study of schools in western New York revealed that some committees draft the IEP before the IEP meeting and before obtaining the parents' input. Others draft the IEP during or after the meeting. Engel, "Law, Culture, and Children with Disabilities," p. 188.

In recognition of some school district practices, as well as the desires of many parents, OSEP has advised that the use of draft IEPs is permissible as long as the practice does not operate to inhibit the parents from participating fully in their child's IEP meeting. The IEP must be finalized at the IEP meeting after a thorough discussion of the child's needs. *See* U.S. Department of Education, Office of the General Counsel, Response to Affected Agency Review of U.S. Commission on Civil Rights, *Equal Educational Opportunity and Nondiscrimination for Students with Mental Retardation, Learning Disabilities, Behavioral Disabilities, and Serious Emotional Disturbance: Federal Enforcement of Section 504* (draft) (May 22, 1997), chapter 7, item 14, p. 22.

[165] At the 10 field hearings held by the National Council on Disability from October to November of 1994, many parents reported that they arrived at IEP planning meetings only to be presented with a completed plan. NCD, *Improving Implementation of the Individuals with Disabilities Education Act*, p. 11.

[166] *See* National Council on Disability, *Improving Implementation of the Individuals with Disabilities Education Act: Making Schools Work for All of America's Children-Supplement*, Apr. 26, 1996, p. 608 (hereafter cited as NCD, *Improving Implementation of the Individuals with Disabilities Education Act-Supplement*).

[167] Harry et al., "Communication Versus Compliance," p. 364. The study notes the comments of one mother who, after 2 consecutive years of "mix-ups" over meeting dates, stated, "I have spoken to them before about letting me know at the last minute—I just can't get time off at such short notice. I had no idea the meeting was coming up." Ibid.

One of the members of the St. Marys County, MD, Board of Education noted that meetings are conducted without including parents and teachers and that parents are not informed or asked for consent or support when special education programs change. The board member indicated that many of these problems could be avoided by having regular meetings with parents, conducting inservice seminars, and updating handbooks for and with them. "Special Education—The Public's Perception and the School Board Role: An Interview with Robert G. Kirkley," *Updating School Board Policies*, vol. 25, no. 4 (1994), p. 3.

[168] Harry et al., "Communication Versus Compliance," p. 364.

[169] Ibid.

> intensive that it actually drives us away from the child instead of closer to the child. It has become a burden to our professionals. You may have five to eight professionals on a team and not one of those people really possess a true trusting relationship with the parents. Not one sees the big picture of this child's life, because they are caught up in the accountability, they are caught up in time, which also becomes their enemy.[170]

One study found, "It was common for parents [who missed an IEP meeting] to be advised 'not to worry' if they could not attend, because the documents would be sent in the mail." That study found that although "most parents said that they had no trouble reading the documents, they also admitted that they did not understand much of the terminology in the reports." That finding was supported by the views of some professionals interviewed in the study who "expressed awareness of the routine nature of the documentation process and stated that they did not think parents really understood much of it, but simply signed it."[171]

Finally, under the IDEA, parents are to work with a team of qualified professionals to determine whether their child is a "child with a disability" within the meaning of the statute and must therefore be provided with special education and related services. In addition, the law provides that parents are to be provided with a copy of the evaluation report on the child. However, the statutory provision states only that "a copy of the evaluation report and the determination of eligibility will be given to the parent."[172] It does not, however, state *when* the parents are to be provided with the evaluation report. This is a serious omission because the parents should have the evaluation report in hand when they meet with the evaluation team to make the determination of eligibility. The provision should therefore include language explicitly stating that parents should receive the report before the determination of eligibility meeting begins.

Family Barriers

"Family" barriers consist of obstacles that can be caused by a parent's limited knowledge of legal rights, his or her attitudes or opinions, or an absence of family resources or opportunities.[173] Also included in this category are those barriers that may be unique to a family such as personal problems experienced by a parent (e.g., illnesses, incarceration, unemployment).[174] "Family" barriers that are becoming more applicable to a growing segment of contemporary American families include economic marginality and social instability due to single-parent homes, continuous exposure to violence, inadequate housing, and impairment of parents or caregivers due to substance abuse.[175] When facing such "family" barriers, it is not unusual for parents to become overwhelmed and thereby unable to be involved with and participate in their child's educational needs.[176] Often these parents have to cope with multiple problems and are unable to take advantage of available resources because of a lack of transportation, limited finances, and limited knowledge on how to use resources.[177]

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[170] NCD, *Improving Implementation of the Individuals with Disabilities Education Act*, p. 57 (comments of Kathy Davis at Des Moines, IA, field hearing).

[171] Harry et al., "Communication Versus Compliance," p. 364.

[172] *See* Pub. L. No. 105–17, § 614(b)(4)(B) (1997) (emphasis added).

[173] Donald Bailey, "Creating Family-Centered Services in Early Intervention: Perceptions of Professionals in Four States," *Exceptional Children*, vol. 58, no. 4, pp. 298–309.

[174] Ibid.

[175] All of these conditions can create stress in parents and "sap their physical energy, try their patience, undermine their sense of competence, and reduce the sense of control over their lives." It is very likely that parents will bring such circumstances to school settings. *See* Marci J. Hanson and Judith J. Carta, "Addressing the Challenges of Families with Multiple Risks," *Exceptional Children*, vol. 62, no. 3 (1995) (hereafter cited as Hanson and Carta, "Addressing the Challenge").

[176] Patton and Braithwaite, "Obstacles to the Participation," p. 36; Hanson and Carta, "Addressing the Challenges," p. 202.

Another aspect of understanding barriers as they relate to families or parents of disabled children is to recognize that "perhaps the only generalization that can be made about [American] families today is that they represent tremendous diversity on all dimensions."[178] In addition to the prevalence of one-parent families with disabled children, children with disabilities may be part of bilingual, multilingual, and/or racially and ethnically diverse families. A demonstration of such barriers is presented in research dealing with minority parents of disabled children.[179]

Language differences between special educators and administrators on the one hand and parents who do not speak English on the other can create barriers to parental involvement.[180] Often special educators and administrators view the inability to speak English as a "disability," a perception that makes these officials avoid or decline to initiate effective communication with these parents.[181]

The differential experiences of families across racial and ethnic lines appear to influence levels of parental involvement. In one study, African American parents from two metropolitan areas were interviewed about their experiences in the IEP meetings and subsequent interactions with school officials. In this study, 38 percent of these parents reported that they had not received information regarding the legal rights of disabled children. Another important finding was that only one-third of the parents felt that there were agencies and organizations in their communities that could assist parents of disabled children.[182] In another study conducted over a 3-year period on African American parents' involvement in special education, it was found that "[t]he main vehicle for parental advocacy in special education [was] formal conferences held at prespecified periods . . . [o]ver the course of 3 years, as parents perceived classroom teachers as increasingly less accessible, these conferences became crucial." The study identified five examples of barriers that were shown to interfere with parental participation and advocacy: "(1) late notices and inflexible scheduling of conferences; (2) limited time for conferences; (3) emphasis on documents rather than participation; (4) the use or over-use of educational jargon; and (5) the structure of power."[183]

Several studies have found that African American and Mexican American parents' levels of information and participation were significantly lower than that of white parents.[184] These studies indicate that the low level of parental participation among some minority parents may be the result of a perception that their children's individual educational needs are not being adequately addressed in special education.[185] However, most minority parents feel that some of their children's needs are not addressed in special education. At

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[177] Hanson and Carta, "Addressing the Challenges," pp. 202, 295.

[178] Ibid., p. 202.

[179] Patton and Braithwaite, "Obstacles to the Participation," pp. 34–37; Harry, *Cultural Diversity*; Harry et al., "Communication Versus Compliance," pp. 364–77.

[180] *See* Lynch and Stein, "Parent Participation by Ethnicity," p. 106; Michael J. Smith and Angela Shen Ryan, "Chinese-American Families of Children with Developmental Disabilities: An Exploratory Study of Reactions to Service Providers," *Mental Retardation*, vol. 25, no. 6 (1987), pp. 345–50.

[181] *See* Harry, "Making Sense of Disability," pp. 35–36; Lynch and Stein, "Parent Participation by Ethnicity," p. 106.

[182] Patton and Braithwaite, "Obstacles to the Participation," p. 34.

[183] Harry et al., "Communication Versus Compliance," p. 364.

[184] Harry, "Restructuring the Participation," p. 123 (citing E.W. Lynch and R. Stein, "Parent Participation by Ethnicity," pp. 105–11).

[185] *See* Harry, "Restructuring the Participation," p. 123 (citing Lynch and Stein, "Parent Participation by Ethnicity," pp. 105–11 and R. Marion, *Educators, Parents and Exceptional children* (Rockville, MD: Aspen, 1981)). *See also* Dan Beyers, "Educators Urge Involvement of Black Parents," *The Washington Post*, Montgomery (County) Weekly, Oct. 10, 1996, pp. 1–2.

least one researcher has suggested that these parents may view education and medical professionals with "suspicion and skepticism."[186]

One of the most important perspectives, regardless of the societal influences that have shaped it, is the parent's attitude and perception of their child's disability. The level of a parent's involvement in decisions on placement often correlates with the viewpoint held by a parent on the notion of disabilities. Some scholars have criticized American society as viewing disabilities as a "problem of difference or 'otherness'."[187] To many parents of children with disabilities, terms such as "retarded" or "handicapped" label their child negatively and create stigma.[188] In the special education setting, one consequence of the prevalence of stigmatic attitudes may be that participants in an IEP meeting focus only on the deficits of the child rather than his or her strengths.[189]

Some parents agree that the distinction between "disabled" and "nondisabled" children is real and significant. To them, a categorization is necessary to mark the differences of their child. Without these classifications, the parents fear they lack a justification for special education and related services necessary for their child's education. These parents indicate that they are accepting of the description of their child as disabled as a means of coping with it in a positive way. To do otherwise would only deny the problem and avoid solutions.

Other parents, however, reject the dichotomy between their child and other children. They view each child as unique and a child's disability merely reflects a particular quality among many qualities arranged along the same continuum.[190] A study of parent perceptions revealed that parents more accepting of the disabled/nondisabled dichotomy found suggestions for segregative placements more plausible and acceptable. Parents viewing their children in terms of the qualities of all children tended to challenge or view as inappropriate recommendations for segregative placements.[191]

One author contends that the IDEA's goal of creating partnerships among parents, children with disabilities, and school district personnel has "clashed repeatedly with community-level norms and expectations."[192] Hence, the goals of the IDEA "may have been thwarted, at least in part, because parents are unwilling to jeopardize relationships by asserting their children's rights."[193]

The special education system must face the challenge of explaining practices and initiating policies for parents of disabled children whose understanding, assumptions, and expectations regarding their children's education have been

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[186] Sontag and Schacht, "An Ethnic Comparison," p. 434.

[187] Engel, "Law, Culture, and Children with Disabilities," p. 180.

[188] Harry, "Making Sense of Disability," pp. 28–29, 34.

[189] Engel, "Law, Culture, and Children with Disabilities," p. 181. As an example, Engel notes the experiences of one family in New York. The child underwent an evaluation for classification and placement upon leaving his preschool program for kindergarten. Although the child's diagnosis clearly specified physical but not cognitive impairments, school personnel serving at the IEP meeting (known in New York as the Committee on Special Education, CSE) did not favor placement in a regular kindergarten classroom. Even after a committee member observed the child in his fully integrated preschool setting, she recommended placement in a self-contained kindergarten class with learning disabled children 2 to 3 years older than the child. The Committee members perceived the child's "difference" as significant enough to preclude integration with nondisabled children. *Id.*, p. 183.

[190] *Id.*, pp. 185–86.

[191] *Id.*, p. 186.

[192] *Id.*, p. 169.

[193] *Id.*

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influenced by a variety of factors, including economic circumstances, race, and ethnicity.[194] Unless professionals working with diverse groups of parents find effective means of ensuring parental involvement and assistance in the special education process, the intent of the law to include these parents throughout the special education process will be undermined.[195]

Knowledge and Attitudes of IEP Participants

> Knowledge of parents remains an "untapped potential of parents as partners in decision making."[196]

The knowledge that each participant brings to an IEP meeting is unique. The parents of children with disabilities know most about their child, particularly his or her behavioral, personality, and other qualitative traits.[197] School representatives bring specialized educational, psychological, and other professional training to the meeting, although the representatives often lack personal familiarity with the child.[198] The differences in knowledge among IEP participants and their attitudes toward one another can have a profound influence on the conduct of an IEP meeting.

One study has described the interpersonal dynamics of IEP meetings as a "structure of power" that "place[s] parents at a distinct disadvantage and undermine[s] parental efforts at advocacy."[199]

One author notes that although some special educators lobbied for more parental involvement, they found themselves in a dilemma. Parental involvement, while viewed by those professionals as a primary means to correct earlier abuses against children with disabilities, also was viewed as a threat to the professionals' decisionmaking and policymaking roles in the area.[200] Consequently, parental involvement has not intensified or increased to the point that professionals have lost control or power over the special education process.[201]

According to another report, educators have been viewed as the experts in education; as a result, parents of students with disabilities play minor roles in the education of their children.[202] Some parents may acquiesce to the recommendations of school representatives because they believe that they cannot or should not question a professional's assessments and advice. They may defer to school representatives on trust that professionals will see to the child's needs. In such cases, the parents' participation may consist only of providing information on the child.[203] One report that summarized the testimony of parents and educators on the IDEA notes, "One reason exclusion exists is that some school districts effectively exploit parents' lack of knowledge regarding their children's rights under IDEA. Parents tend to view professionals as authority figures. With great frustration, they often accept decisions of professionals not to provide their children with disabilities with special education and related services. . ."[204]

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[194] Harry, "Making Sense of Disability," p. 27; Lynch and Stein, "Parent Participation by Ethnicity," pp. 105–06; Bennett, "Gateways to Powerlessness," p. 148. *See* Harry, *Cultural Diversity*.

[195] Harry, "Making Sense of Disability," p. 27.

[196] Harry et al., "Communication Versus Compliance," p. 364.

[197] *See* Kotler, "The Individuals with Disabilities Education Act," p. 372.

[198] Engel, "Law, Culture, and Children with Disabilities," p. 189; *also see* Kotler, "The Individuals with Disabilities Education Act," p. 372.

[199] Harry et al., "Communication Versus Compliance," p. 364.

[200] Kotler, "The Individuals with Disabilities Education Act," pp. 362–63.

[201] Ibid., pp. 363–66.

[202] NCD, *Improving Implementation of the Individuals with Disabilities Education Act*, p. 104.

[203] Engel, "Law, Culture, and Children with Disabilities," pp. 190–91.

The attitudes of parents and professionals are crucial to the participation of parents in the IEP process. For example, some school representatives and other professionals regard the parents views as less than credible.[205] There are several reasons for this perspective. First, professionals attending IEP meetings often outnumber the parents and the individuals accompanying the parents, and professionals generally are more receptive to the input of their colleagues than of the parents. Second, professionals may consider the parents' views as clouded by emotional attachment to the child. Third, parents often are less knowledgeable of and articulate in the technical concepts or "jargon" used in the IEP meeting.[206] Because of these factors, professionals tend to consider the parents' statements only for the information they can provide about the child and not for the parents' opinions or advice about the child's needs. For example, in one study, surveyed school personnel expressed the feeling that "parents of exceptional children lacked sufficient expertise to be involved in educational decision making."[207] According to that study, such attitudes among professionals minimize parental involvement and limit a productive parent-school partnership.[208]

Another study reports that the use of unexplained jargon in IEP meetings is a common practice. Its impact on parental involvement has, in fact, been described as a "silencing effect . . . on nonprofessional members of placement meetings." The study revealed that parents "generally ignored the details of technical reports and relied for most of their information on the teacher, whether in or outside the meeting."[209]

Other researchers concur that miscommunication between teachers and parents can affect parents' understanding about their rights and roles and their knowledge about community resources and services and can create parental "alienation" from the school.[210] This phenomenon of alienation is especially prevalent among African American parents of children in special education. Studies show "extreme alienation and markedly low awareness of rights and procedures."[211]

Some IEP participants, however, hold different attitudes about the role of the parent. A study of IEP meetings in Western New York noted the views of one school representative, a chair to a Committee of Special Education (CSE),[212] who reported an unusually high parental attendance rate at IEP meetings. The CSE chair described

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[204] NCD, *Improving Implementation of the Individuals with Disabilities Education Act*, pp. 22–23.

[205] Ibid., p. 101 ("Despite all the wonderful changes, many parents are still not given the respect they deserve as experts about their own children. Many fathers are still left out of the process entirely. And many parents are subjected to humiliating, destructive encounters with education and health care professionals. I believe that this is because well-intentioned professionals are not sufficiently trained on how to communicate with and collaborate with parents. Accordingly, I urge that the reauthorization legislation mandate training of this kind.") (comments of Stanley Klein at Boston, MA, field hearing on IDEA).

[206] *See* ibid., p. 43 ("Over and over again, parents testified about being shut out of the assessment and evaluation process. One barrier to their participation in the evaluation process is the use of technical or other language unfamiliar to ordinary persons.").

[207] Yanok and Derubetis, "Comparative Study of Parental Participation," p. 198.

[208] Ibid., p. 197.

[209] *See* Harry et al., "Communication Versus Compliance," p. 364.

[210] M. Laurie Leitch and Sandra S. Tangri, "Barriers to Home-School Collaboration," *Educational Horizons* (Winter 1988), pp. 70–74.

[211] *See* Harry, "Restructuring the Participation," p. 123 (citing E. Cassidy, *Reaching and Involving Black Parents of Handicapped Children in their Child's Education Program* (Lansing, MI: CAUSE Inc., 1988) (ERIC Document Reproduction Service No. Ed 302 982)).

[212] In New York, IEP meetings are conducted by multidisciplinary teams known as Committees of Special Education.

several steps she would take to encourage parental involvement if the parent assumes a passive role: (1) remind the parent of the importance of participation, (2) emphasize that the professionals' views were not infallible or necessarily correct, and (3) stress the importance of the parent's knowledge of the child.[213] The study also described other attitudes supporting parental involvement. Another CSE chair advised against holding pre-IEP meetings that the parents could not attend because if discussions and recommendations preceded the meeting, the importance of parental participation implicitly would be undercut.[214] A third CSE chair insisted on writing the IEP by hand during the meeting while sitting next to the parents, and going over each statement and recommendation with the parent as it was written to emphasize the parents' involvement.[215]

Literature reveals other steps that schools and parents recommend to promote parental involvement. One school district encourages the use of parent advocates to advise, interpret, and argue on behalf of parents in their dealings with the interdisciplinary committee.[216] A parent testifying before a field hearing on the IDEA advocates parent education programs on the disabilities specific to each parent's child and on the IEP and procedural due process systems.[217]

Lack of Parent Training and Information

A major factor in the level of parental involvement in special education is the amount of parental knowledge, training, and accessible information about the IEP process and substantive and procedural rights. At field hearings on the IDEA, many parents indicated that they attended IEP meetings and often accepted the schools' recommendations on an IEP because they were unaware of their rights under the law.[218] One article reported that some parents of children with disabilities described an intimidating, denigrating, and condescending process when they became involved in their children's education.[219] Similarly, some parents testifying at field hearings on the IDEA indicated that they felt intimidated because they did not know what to expect from the IEP

Committee members are appointed by the board of education or trustees in each school district. The Committees must include a school psychologist, a teacher or administrator of special education, a school physician, and a parent of a disabled child. Engel, "Law, Culture, and Children with Disabilities," p. 177. *See also* N.Y. Educ. Law § 4402(1)(b)(1) (McKinney 1990).

[213] Engel, "Law , Culture, and Disabilities," p. 192.

[214] *Id.*, p. 192.

[215] *Id.*

[216] *Id.*, p. 201 (citing J. Handler, "Dependent People, The State, and the Modern/Postmodern Search for the Dialogue Community," *University of California–Los Angeles Law Review*, vol. 35 (1988), pp. 1010–12; J. Handler, *The Conditions of Discretion: Autonomy, Community, Bureaucracy* (1986), pp. 84–118.

[217] *See* NCD, *Improving Implementation of the Individuals with Disabilities Education Act*, p. 57 ("Before you can educate child, you have to educate their parents. A parent who knows little about their child's disability and even less of bureaucratic process involved in educating his child is at a serious disadvantage." (comments of Lisa Reader at Albuquerque, NM, field hearing).

[218] *See* ibid., p. 104.

[219] Gartner and Lipsky have noted:
"The narratives of parents of children with disabilities repeatedly describe the power struggles surrounding their involvement in the students' education and the devaluing or denigration of their knowledge about their children. Their concerns are often dismissed, their requests are often patronized, and their reports of the child's home behavior are often distrusted. While not all parent-professional relationships are characterized by these factors, the pattern does appear to be endemic. . . Further, this attitude often leads to an over-valuing of the knowledge of so-called experts. . . Summarizing the growing parent literature: 'The narrative repeatedly express anger, frustration, and resentment . . . at the unnecessary burdens they and their children face because of social attitudes and behavior toward disabilities.'" Alan Gartner and Dorothy Kerzner Lipsky, *Beyond Separate Education: Quality Education for All* (Baltimore: Paul H. Brookes Co., 1989), p. 379.

meeting, they did not know their rights as parents under the IDEA, or they did not understand the technical language used by professionals.[220] Two parents suggested that parents of students with disabilities could benefit from sharing information with one another.[221]

One study emphasized the importance of providing parents with information about special education and other services that are available to children with disabilities and their families.[222] In the study, family and friends were cited more frequently as sources of information than professionals. If parents received information from professionals, parents indicated that medical doctors rather than school staff were their primary source of information. The parents reported that information concerning rehabilitative services, educational activities, and family support services were not as readily available.[223]

In the same study, Hispanic and American Indian parents reported more difficulty than white parents in obtaining information about a child's problem or what could be done for the child.[224] Consequently, those parents were less involved than white parents in the coordinating role to obtain special education services at their children's school. None of the American Indian parents was a coordinator, and American Indian parents were less likely to volunteer to work with the school's program. According to the study, minority parents reported a need to know how to get services, thus "suggesting that they are not sufficiently linked to service agencies."[225]

Teacher Preparation, Training, and Attitudes

Teacher preparation, training, and attitudes have been critical in educating students with disabilities particularly in light of current law, policies, and advocacy supporting placement of students with disabilities in regular education classes. A large number of witnesses testifying at field hearings on the IDEA credited the work of school staff members with the successful inclusion of students with disabilities in regular classes.[226] They pointed to positive attitudes about integration and the quality and training of regular education teachers, special education teachers, support teachers, and staff as important factors in successful integrated placements.

Students with disabilities and their parents can face a difficult battle if teachers do not support the placement of the students in regular education classes. As one observer noted:

> As a former principal, I believe teacher attitudes and perceptions are critical to successful inclusion for any child, regardless of how minor the handicap. . .Many teachers feel overwhelmed just keeping up with their daily routine and their regular children, let alone teaching a handicapped child. They do no feel educationally, emotionally, or, sometimes, philosophically prepared to handle handicapped children in their classrooms . . . But reality intrudes, Where will the money come from? Where's the available time? Most local school districts are strapped for both. Few special education departments or district instructional specialists have the staff or expertise to provide the training classroom teachers so desperately need.[227]

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[220] NCD, *Improving Implementation of the Individuals with Disabilities Education Act*, p. 58.

[221] *See* ibid., pp. 101 (comments of Lisa Reader testifying at Albuquerque, NM, field hearing), 105 (comments of David Maltman testifying at Anchorage, AK, field hearing).

[222] Sontag and Schacht, "An Ethnic Comparison" pp. 422, 430.

[223] Ibid., pp. 430–31.

[224] Ibid., p. 431.

[225] Ibid.

[226] *See* NCD, *Improving Implementation of the Individuals with Disabilities Education Act*, p. 83.

[227] Elaine L. Wilmore, "When Your Child Is Special," *Educational Leadership*, vol. 52, no. 4 (December-January 1994–1995), p. 62.

In testimony before field hearings on the IDEA, several of the 50 individuals discussing education professionals' attitudes noted that many teachers are unhappy about inclusion and are not always receptive to having a child with disabilities in their classroom. One parent stated that in her city, the teachers' union sought a moratorium on the placement of students with disabilities in regular classes; they wanted teacher "veto power" over the acceptance of students with disabilities in their classrooms.[228] The effect of negative teacher attitudes can be profound. Witnesses at the field hearings stated that, because of these negative attitudes, students with disabilities and their parents must bear the burden to "prove" that students are "ready" for placement in regular education classes and that they have "earned" their way out of segregated settings, contrary to the provisions of the law.[229]

According to one witness at the IDEA field hearings, the negative attitudes held by some teachers and other education professionals about the placement of students with disabilities in regular classes stem, in part, from a lack of training on the purposes and methods of integrating disabled students. Patty Gilg testified at the National Council on Disabilities' October and November 1994 field hearings on IDEA in Des Moines, Iowa. She noted, "[At the college I attend,] they teach that including students with disabilities is against the LRE requirement and that segregated classes and schools are the best environments for students with moderate or severe disabilities."[230]

A common theme of the hearings on the IDEA was that educational training programs "need to produce graduates who have the skills and experience to provide intensive developmental and remedial instruction to students with disabilities in regular education settings."[231] More than 20 witnesses stressed a need for teacher preparation in the following areas: (1) working with students with disabilities and their families, (2) learning about disabilities to promote understanding, (3) understanding the IDEA and the least restrictive education requirements, (4) focusing on students' abilities as well as understanding their disabilities, and (5) training administrators on the IDEA.[232]

Some special educators have little or no preparation for, or training in, working with families.[233] This is reflected in the curriculum requirements of teacher education programs, which typically have a paucity of required coursework dealing with parents and families.[234] There is also evidence that some special education professionals can face various dilemmas in working with parents of disabled children or in choosing between professionalism and personalism.[235]

Addressing the Barriers to Parental Involvement

This discussion of existing barriers to parental involvement in special education demonstrates how extensive and far-reaching the obstacles can be in preventing or discouraging parents from working in active and effective partnerships with professionals to ensure their children's educational rights. In analyzing these barriers, the research discussed shows no evidence that parents themselves were singularly or primarily responsible for these barriers. For too many parents, a shared experience is captured by the following statement:

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[228] NCD, *Improving Implementation of the Individuals with Disabilities Education Act*, p. 85.

[229] Ibid., p. 86.

[230] *See* ibid., p. 87.

[231] Ibid., p. 11.

[232] Ibid., pp. 87–88. The witnesses emphasized that administrators must become more familiar with what is involved in including a child in the regular classroom. This training would enable administrators to have a foundation to support teachers in the inclusion of students with disabilities in regular classes. Ibid., p. 88.

[233] Thomas H. Powell, "Parent-Professional Participation," p. 613.

[234] Karnes et al., "Programs for Parents," p. 207; Diane Scott-Jones, "Families and Academic Achievement," p. 264.

[235] *See* Harry, *Cultural Diversity*, p. 181. The term "personalism" is used to convey a tendency to relate to parents or clients in a friendly or nonprofessional manner. For some professionals, such as social workers, this may create a conflict of interest when they wish to be friendly and personal with parents but also may have to take a position contrary to the interests of the parents. Such a situation can frequently occur with minority group professionals working with minority parents.

> . . . schools remain impregnable mysterious places into which parents are allowed to venture for prescribed activities and sometimes only because of existing Federal and State mandates. In many schools parents are still viewed as uninvited guests whose participation is required, not welcomed. Some professionals still see parents as the focus for blame, rather than as vital contributors to their child's education.[236]

To some extent, while the burden of responsibility lies primarily in the educational system, there is more than ample evidence that additional work is needed with parents of children with disabilities and by these parents themselves. Given the large investment that parents have in ensuring an appropriate education for their children, it is important that parents know the law, understand the perspectives of professional educators and other service providers, and learn how to advocate proactively and effectively.[237] There is ample evidence that parental training and involvement initiatives should be targeted to minority parents; that professionals require greater acumen in understanding the needs of children with disabilities and their parents in minority and impoverished families;[238] and that there is a need to create with minority parents new models shifting from the concept of parent advocacy to empowering parents.[239]

Parental Involvement: OCR's Enforcement Efforts

The section 504 regulations contain provisions that address parental involvement. These provisions require school districts to provide parents or guardians (1) an opportunity to examine records relating to the identification, evaluation, or educational placement of their child, and (2) an impartial hearing in which they have an opportunity to participate with representation by counsel.[240] The regulations also specify that, to ensure consistency between section 504 and the IDEA compliance standards, compliance with the procedural safeguards requirement of the IDEA can be one means of meeting the section 504 requirements.[241] Further, the IDEA requirements on procedural safeguards are recommended as a model on section 504 compliance.[242]

The regulations are silent on parental involvement in evaluation and placement decisionmaking. They specify that in interpreting evaluation data and making placement decisions, a recipient shall (1) draw upon a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; and (2) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.[243] The regulations, however, do not specify whether a student's parents or the parents' representatives should be one of the sources drawn upon to provide information about the student. In addition, the regulations do not indicate whether the parents should be part the group making the placement decision, nor do they contain criteria for determining who are "persons knowledgeable about the child."

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[236] Thomas H. Powell, "Parent-Professional Participation," p. 607.

[237] Ibid.

[238] Diane Scott-Jones, "Families and Academic Achievement," p. 259.

[239] Harry et al., "Communication Versus Compliance," p. 375. Parent empowerment represents a systemic restructuring of parent roles as viewed by professionals and involves more inclusive, personalized, and informed roles in interacting with professionals. There is also a view that multiple levels and models of advocacy can still be effectively implemented in working with parents and families of disabled children. Examples of levels of advocacy include self-advocacy, social support advocacy, interpersonal advocacy, and legal advocacy. *See* Sandra Alper, Patrick J. Schloss, and Cynthia N. Schloss, "Families of Children with Disabilities in Elementary and Middle School: Advocacy Models and Strategies," *Exceptional Children*, vol. 62 (1995), pp. 261–70.

[240] 34 C.F.R. § 104.36 (1996).

[241] *Id.* The section 504 regulations, as originally proposed, made compliance with the IDEA, then the EHA, the only standard for compliance. However, the provision was revised in the final issuance of the rulemaking. OCR noted that "[b]ecause the due process procedures of the EHA . . . are inappropriate for some recipients not subject to that Act, the section now specifies minimum procedures." 34 C.F.R. pt. 104, app. A, subpt. D, no. 25 (1996).

[242] 34 C.F.R. pt. 104, app. A, subpt. D, no. 25 (1996).

OCR has not provided formal clarification on these issues through policy interpretation or memoranda. However, according to a staff attorney with OCR's Philadelphia office, one of the sources drawn upon in interpreting evaluation data and making placement decisions should be a parent of the student. Therefore, in cases where, for example, a parent complains that the school district has developed an education program or made a placement decision for the student without consulting the parent, OCR would advise the school district that the student's parent should be a source used in developing the education program and deciding placement.[244]

OCR has addressed the issue of parental involvement in developing an educational program for a student in at least two cases. In one case the complainant alleged that the district's procedures did not allow parental participation in developing the IEP because parents were offered a proposed placement determined at a separate meeting that they were not permitted to attend and because they had to either accept the proposed placement or request a due process hearing. OCR noted that the IDEA guidelines, which are one means of satisfying section 504 requirements, permitted school districts to present draft IEPs for discussion with parents. The guidelines also permit school districts to hold a separate meeting without parental participation provided that the placement decisions are made at the IEP meeting. OCR found that the evidence did not establish a violation of section 504. Among the evidence, OCR found that there were written instructions to the school district staff clearly advising participants in IEP meetings to review evaluative data with parents, to develop goals and objectives by soliciting parental suggestions, to review parental rights, and to obtain written parental consent to placement. In addition, the school district provided OCR with letters and written statements from parents generally praising the special education program and the benefits derived by their children. Finally, the district's files documented parental participation and consent to placement and only an "insignificant number" failed to contain this documentation.[245]

In a later case, a complainant met with school officials to discuss her son's education program. School officials had proposed changes to the student's special education reading program, changes that the complainant rejected. She requested that her son's private reading tutor, a certified reading specialist who had accompanied the complainant to the meeting, be permitted to offer an assessment of the student's reading needs and to discuss instructional techniques. The school's principal refused permission because it was his determination that the dispute should be brought to a due process hearing and because he wished to avoid an "adversarial" exchange between the student's special education teacher and the private reading specialist. OCR determined that this refusal did not violate section 504. According to OCR:

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[243] 34 C.F.R. § 104.35(c)(1)&(3) (1996).

[244] Judy Stover, Equal Opportunity Specialist, and Catherine Edwards, Staff Attorney, OCR, Region III, DOEd, telephone interview, June 18, 1996, p. 1 (hereafter cited as Stover and Edwards interview) ("Under the evaluation provisions of the Section 504 regulations where it is required that a district draw upon a variety of sources, our position is that one of those sources should be a parent.") (comment of Catherine Edwards).

[245] Linda A. McGovern, Acting Regional Director, OCR, Region V, DOEd, letter to Richard Wiggall, Superintendent, Elgin School District U–46, Elgin, IL, re: Complaint No. 05–83–1116, July 31, 1985, *reprinted in* 352 EHLR 130, 142.

> The Section 504 regulation requires that persons knowledgeable about the child, the meaning of the evaluation data, and the placement options be present at placement decision meetings. CSD met this requirement by having [the student's] special education teacher, special education administrators, and the student's parent present for the April 4, 1986 meeting. Furthermore, at the time of the denial of permission for the tutor to speak, it was evident that a due process hearing would be necessary to resolve the placement issue, and that no placement decision would be made at the April meeting.[246]

In addition to considering parental involvement in the development of educational programs, another issue OCR investigates is whether there was parental consent to evaluations determining special education eligibility and to a student's initial placement. The IDEA implementing regulations require a school district to obtain parental consent before conducting a preplacement evaluation of a student or initially placing a student with a disability in a program that provides special education and related services.[247] One means of providing an appropriate education under section 504 is through implementation of an IEP in accordance with the IDEA.[248] Therefore, according to an equal opportunity specialist with OCR's Philadelphia Office, OCR will consider whether a school district obtained parental consent when it investigates cases on a student's evaluation for special education services or placement into a special education program.[249]

In determining whether a school district obtained parental consent, OCR has reviewed files to identify documentation of the consent. In one case, OCR reviewed files and found that parental consents to place students in a separate school were not documented in the records of many of the 24 files reviewed. OCR also found that there were "irregularities" on the parental consent forms for two students. For example, one consent form appeared to be signed by the parent but dated by someone else, and another consent form was signed by the parent, but the year in the date apparently had been changed. In addition, OCR found that parental consents were not obtained before students' placements were changed from the separate school to the regular education environment. Based on its findings, OCR determined that the school district failed to comply with the section 504 regulations addressing procedural safeguards.[250]

Beyond ensuring that the regulation requirements have been met, OCR encourages parental involvement through other means, such as proactive activities, resolution agreements, and other remedies in cases.[251] As strategic goals, OCR has sought to involve parents, as well as advocacy groups and education experts, in the proactive targeting of its resources.[252] It also has sought to empower students and their parents to learn to solve their own problems of securing equal access to quality education. To meet this second goal of student/parent empowerment, OCR has focused on outreach and collaboration with parents and their communities.[253] In many instances, OCR has accomplished these aims. For example, according to staff members at the headquarters and regional offices, OCR has sought to involve parents in compliance reviews and at the remedies stages of reviews and investigations to educate parents of students who are classified with disabilities. Prior to conducting a compliance review, OCR has contacted parent groups, such as the school's parent-teacher association, local advocacy groups, or church groups, and it has met with parents, members of community groups, and school district officials and staff to discuss issues related to the compliance review and to explain what OCR planned to do during the review and what it was looking for.[254] OCR also usually has consulted with parents and the student as to the best remedies for a case, although OCR makes the final decision on a remedy.[255]

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[246] Jeannette J. Lim, Acting Director, OCR, Region III, DOEd, letter to Harry Harhigh, Superintendent, Centennial School District, Warminster, PA, re: Complaint No. 03–86–1067, June 5, 1986, *reprinted in* 352 EHLR 212, 213.

[247] 34 C.F.R. § 300.504(b) (1996).

[248] *Id.* § 104.33(b) (1996).

[249] *See* Stover and Edwards interview, p. 1 ("we would always ensure that there was parental permission prior to any evaluation being conducted on the student in order to determine their eligibility for special education.") (comment of Judy Stover).

[250] OCR, Complaint No. 04–86–1191, 352 EHLR 348.

[251] *See* Stover and Edwards interview, p. 1 ("Parental involvement may be direct under the evaluation resolution of that particular school district. Sometimes a school district should involve parents as a source . . . We encourage schools to use parents as a resource. Indirect involvement of the parents through notification is always required.").

[252] DOEd, OCR, Strategic Plan, July 22, 1994, draft, pp. 1–2.

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[253] Ibid., pp. 5–6.

[254] *See* Jean Peelen, Enforcement Director, OCR, DC Metro Office, DOEd, interview in Washington, DC, May 28, 1996, p. 7 (Ms. Peelen is also the former issue contact person for minorities in special education.); Stover and Edwards interview, p. 2 (OCR held a focus grouping meeting at a school system where it was to do a minorities in special education compliance review. Approximately 50 parents attended this meeting.); Linda Colón, Team Leader, OCR, Region II, DOEd, telephone interview, June 26 and 27, 1996, p. 4.

[255] *See* Stover and Edwards interview, p. 4. OCR usually consults with students who are "old enough," usually middle and high school age children. If a student is under the age of 18, however, OCR must obtain the parent's permission before speaking with a student on a case. Ibid.

Chapter 8

Teachers, Facilities, and Other Resources

Teacher Training, Certification, and Allocation

Background

Training and allocation of teachers, aides, and other school staff to educate students with disabilities are some of the major concerns of educational researchers and policymakers.[1] There has been much emphasis on the importance of and need for qualified teaching personnel in the education of students with disabilities, because teachers play a critical role in all aspects of educating students with disabilities.[2] Teacher training for both regular and special education teachers is important to the accurate identification and assessment of students with mental retardation, learning disabilities, behavior disorders, or serious emotional disturbance.[3] It is essential to successful efforts to place students with disabilities in regular classes.[4] Because teachers and instructional aides work most closely with students with disabilities, they often are the most informed of students' differing skills and abilities and of the need to adjust educational programs or placement. Therefore, teacher training is critical to ensuring that the differing skills and abilities of students with disabilities are identified and met appropriately.[5] Also, teachers often can be the key to ensuring that students with disabilities have access to the multitude of educational courses and other options in the school. Further, they play an integral role in counseling and encouraging students with disabilities to maximize their full potential.[6]

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[1] *See* Christopher A. Kearney and Mark V. Durand, "How Prepared Are Our Teachers for Mainstreamed Classroom Settings? A Survey of Postsecondary Schools of Education in New York State," *Exceptional Children*, vol. 59, no. 1 (September 1992), p. 6; Margaret J. McLaughlin, Carol H. Valdivieso, Kathleen L. Spence and Bruce C. Fuller, "Special Education Teacher Preparation: A Synthesis of Four Research Studies; Institute for the Study of Exceptional Children and Youth, University of Maryland, 1982–1986," *Exceptional Children*, vol. 55, no. 3 (November 1987), p. 215 (hereafter cited as McLaughlin et al., "Special Education Teacher Training"); Christine O. Cheney and Mary Ann Demchak, "Preparing Rural Educators of Students with Severe Disabilities: Summer Institutes and Ongoing Support," in *Reaching to the Future: Boldly Facing Challenges in Rural Communities* (conference proceedings of the American Council on Rural Special Education, Las Vegas, NV, Mar. 15–18, 1995), *reproduced by* EDRS, ED # 381 311, p. 2.

[2] *See* Jerry E. Whitworth, "Personnel Recruitment and Retention in Special Education: Meeting the Challenge" (paper developed for the Illinois State Board of Education, December 1993), p. 1, *reproduced by* EDRS, ED# 376 651; Judith D. Singer, "Are Special Educators' Career Paths Special? Reports From a 13-year Longitudinal Study," *Exceptional Children*, vol. 59 (December 1992), p. 262; Donald S. Marozas and Deborah C. May, *Issues and Practices in Special Education* (White Plains, NY: Longman, Inc., 1988), pp. 32–52.

[3] *See* H. Rep. No. 544, 101st Cong., 2d sess. 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1727 ("Too often, educators have been poorly informed and untrained in [traumatic brain injury]; therefore, they inappropriately classify these students as mentally retarded, emotionally disturbed, or learning disabled, or some other category equally inappropriate. The lack of a proper identification process leads to the student receiving education and related services which do not ameliorate acquired cognitive and behavioral disabilities.").

[4] *See* National Association of State Boards of Education, *Winning Ways: Creating Inclusive Schools, Classrooms, and Communities*, May 1995, pp. 13–36 (hereafter cited as NASBE, *Winning Ways*); Deanna J. Sands, Lois Adams, and Donna M. Stout, "A Statewide Exploration of the Nature and Use of Curriculum in Special Education," *Exceptional Children*, vol. 62 (September 1995), p. 68 (hereafter cited as Sands et al., "A Statewide Exploration of Curriculum in Special Education"); Ray Van Dyke, Martha Ann Stallings, and Kenna Colley, "How to Build an Inclusive School Community: A Success Story," *Phi Delta Kappan*, February 1995, p. 477; Miriam A. Phelps, *Inclusion and Integration and School Climate* (1993); Beverly R. Guterman, "The Validity of Categorical Learning Disabilities Services: The Consumer's View," *Exceptional Children*, vol. 62, no. 2 (October 1992), p. 111. *See also* Richard H. Good, III, Kathleen Rodden-Nord, and Mark R. Shinn, "Effects of Classroom Performance Data on General Education Teacher's Attitudes Toward Reintegrating Students with Learning Disabilities," *School Psychology Review*, vol. 21, no. 1 (1992), p. 152; U.S. Department of Education (DOEd), *To Assure the Free Appropriate Public Education of All Children with Disabilities, Seventeenth Annual Report to Congress on the Implementation of The Individuals with Disabilities Education Act*, 1995, pp. 18–19 (hereafter cited as DOEd, *1995 IDEA*

Federal Law and Policy

Recognizing the importance of qualified teaching personnel in the education of students with disabilities, Congress included provisions in the IDEA to promote teacher training and sufficient allocation of teaching staff.[7] For example, under Part B of the IDEA, State education agencies must include in their State plans a description of the statewide programs and procedures for the training of regular and special education teachers and other support personnel and the State standards for ensuring that teachers instructing or providing support services to students with disabilities are qualified and competent.[8] Similarly, at the local level, a school system that seeks IDEA program funds must include in its application the State procedures demonstrating how the school system will implement and use the comprehensive system of personnel development established by the State.[9]

Beyond the Part B requirements for State education agencies and school districts, the IDEA also establishes a grant program specifically to assist in the training of special education teachers. Under the IDEA Amendments of 1997, DOEd can award competitive State grants targeting systemic improvements in special education programs. In Part D of the act, National Activities to Improve Education of Children with Disabilities, the IDEA has established a "system of grants to improve results for children with disabilities through systemic reform with an emphasis on personnel training."[10] The IDEA requires State educational agencies to work in partnership with various entities and groups in identifying the special education needs of the State, and developing an improvement plan to address those needs.[11]

Report (citing Janney, Snell, Beers, and Raynes, 1995; Salisbury, 1991; Fuchs, Fuchs, Hamlett, Phillips, and Karns, 1995).

[5] *See* Caroline M. Bredekamp, *The Gifted/Learning Disabled Student: A Contradiction in the Classroom*, master's thesis, University of Northern Iowa, July 1993, pp. 56–57 (ERIC Document No. 374 579).

[6] *See* Stanley E. Wigle and Daryl J. Wilcox, "Inclusion: Criteria for the Preparation of Education Personnel," *Remedial and Special Education*, vol. 17, no. 5 (September 1996), p. 326. According to Wigle and Wilcox, "[t]he criterion of maximization of student success suggests that if general classroom teachers are to maximize success for students with disabilities, they need to exit teacher preparation programs with a sound understanding of the concept of [least restrictive environment]—what it is and what it is not." Ibid.

[7] *See* Pub. L. No. 91–230, §§ 613, 614, 631, 84 Stat. 179, 184, *as amended by* Pub. L. No. 93–380 §§ 614(c),(d), 615(b),(c), 618, 88 Stat. 581, 583, 611, *as amended by* Pub. L. No. 94–142 § 5(a), 89 Stat. 776–94, *renamed* the Individuals with Disabilities Education Act, Pub. L. No. 101–476, 104 Stat. 1142 (codified as amended at 20 U.S.C. § 1431 (1994)) *amended by* the IDEA Amendments of 1997, Pub. L. No. 105–17, §§ 612(a)(14), (15), 613(a)(3), 653(c)(3)(D).

[8] *See* Pub. L. No. 105–17, § 612(a)(14), (15) (1997).

[9] *Id.* § 613(a)(3).

[10] *Id.*, § 654(b) (1997); *see also* H. Rep. No. 105–95, at p. 117 (1997).

[11] State educational agencies must establish collaborative partnerships with local and State agencies involved in or concerned with the education of students with disabilities. State educational agencies are also required to work in partnership with other persons and organizations including the Governor, parents of children with disabilities, parents of nondisabled children, organizations representing children with disabilities, community-based organizations, the lead State agency for [Infants and Toddlers with Disabilities], general and special education teachers, and early intervention personnel, the State advisory panels established under [Infants and Toddlers with Disabilities], the State interagency coordinating council

The IDEA requires States to use 75 percent of funds received under State Improvement Grants for personnel training.[12] DOEd may provide grants, including scholarship grants, to institutions of higher education and other appropriate nonprofit agencies to assist in training personnel for careers in special education and early intervention. It may make grants to institutions of higher education, State agencies, and other appropriate nonprofit agencies to conduct special projects to develop and demonstrate new approaches for preservice training for regular educators, training of teachers to work in community and school settings with secondary students who have disabilities, and for the inservice training of special education personnel.[13] In addition, it may provide grants to State education agencies to assist States in establishing and maintaining preservice and inservice programs[14] to prepare personnel to meet the needs of infants, toddlers, children, and youth with disabilities.[15] Any State that can demonstrate to DOEd that it has regular education and special education personnel who have the skills and knowledge necessary to meet the needs of students with disabilities has the option of using not less than 50 percent of funds for professional development.[16] These Federal grant programs can have a major influence on teacher training in special education.[17] They have affected curriculum content in special education training programs by providing grants to expand curricula into specialized areas, such as early childhood, vocational education, and individuals with severe disabilities.[18]

Section 504 does not specifically address teacher allocation or certification. However, the regulations implementing section 504 require that recipient public elementary and secondary schools provide a free appropriate public education to students with disabilities.[19] The regulations define an appropriate education as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met. According to the appendix to the regulations, that requirement means that the quality of educational services provided to students with disabilities must be equal to that of students who do not have disabilities. Therefore, the teachers of students with disabilities "must be trained in the instruction of persons with the [disability] in question."[20]

Regular Education Teachers

According to experts, "the most serious teacher education problem confronting special education today is preparing classroom teachers with the knowledge, skills, and dispositions to work effectively with students with disabilities."[21] Although

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established under [Infants and Toddlers with Disabilities], and institutions of higher education within the State. Pub. L. No. 105–17, § 652(b)(1) (1997).

[12] Pub. L. No. 105–17, § 654(b)(1) (1997).

[13] *Id.*, § 654(a)(2) (1997); *see also* H. Rep. 105–95, at p. 117. (1997).

[14] Preservice training programs are those programs that train individuals to become teachers; inservice programs are those training programs a teacher receives while working.

[15] Pub. L. No. 105–17, § 654(a)(2) (1997).

[16] *Id.*, § 654(b) (1997).

[17] *Id.*

[18] McLaughlin et al., "Special Education Teacher Preparation," p. 215.

[19] 34 C.F.R. § 104.33(a) (1996).

[20] *Id.* pt. 104, app. A, no. 23 (1996).

[21] Paul T. Sindelar and Karen L. Kilgore, "Teacher Education," pp. 393–432 in Margaret C. Wang, Maynard C. Reynolds, and Herbert J. Walberg, eds., *Handbook of Special and Remedial Education: Research and Practice*, 2nd. ed. (Tarrytown, NY:

regular education teachers are playing an increasing role in the education of students with disabilities, research shows that regular education teachers are not provided sufficient training in special education. Only about one-third of the States require regular education teachers to have completed a course in special education to obtain certification, although many other States require content in special education that need not be provided in a separate course on special education. Approximately four-fifths percent of teacher education programs require students to take one course on special education, but only one-fifth require more than one course.[22]

Special Education Teachers

In recent years, there has been much concern regarding special education teachers. These concerns generally have involved two subjects: (1) the quality of instruction, in essence, teacher training and (2) the number of qualified teachers available to educate students with disabilities.[23]

Quality of Teaching—Training and Certification of Special Education Teachers

Teacher training is a primary element in ensuring that special education teachers are qualified and competent to instruct students with disabilities. Over the years, there have been several concerns about the preparation and certification of special education teachers.[24] One basic concern is that special education teachers are not receiving the training they need to instruct students with disabilities effectively.[25] For example, a 1995 study of special education training found a recognition among teachers and administrators of inadequate training in curriculum development. According to the study, 75 percent of special education teachers responding to the study's questionnaire identified a need for further training in elements of curriculum development and modification.[26]

Training and certification programs for special education teachers also have been criticized for not preparing teachers in other aspects that extend beyond the educational instruction provided to students. Congress noted in the House report accompanying the bill for the IDEA Amendments of 1997 that "[i]n many States, the greatest need for training is for in-service training for general and special education teachers, and for pre-service training in addressing the special instructional needs of children with disabilities, including their integration in regular education classes, for future general education personnel."[27] For example, studies reveal that some training programs lack an indepth teaching of communication and consultative skills and procedural requirements of the IDEA. One study of special education teacher preparation found that "[i]t was not unusual for a faculty member to say that a specific competency area (most frequently working with parents and consultation skills) should have a full

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Elsevier Science, 1995), p. 401.

[22] Ibid.

[23] *See* Marozas and May, *Issues and Practices in Special Education*, pp. 3, 33–34 (discussing various reports on the quality of teaching, teacher training programs, and shortage of qualified teachers).

[24] *See, e.g.*, Sands et al., "A Statewide Exploration of Special Education," p. 68; Allen M. Huang et al., "State Certification," in Lyndal M. Bullock and Richard L. Simpson, eds., *Critical Issues in Special Education: Implications for Personnel Preparation* (monograph, February 1990), *reproduced by* ERIC Document Reproduction Service ED# 343 338, pp. 1–11.

[25] *See* Sands et al., "A Statewide Exploration of Special Education," p. 68; Cheney and Demchak, "Preparing Rural Educators," p. 2.

[26] Sands et al., "A Statewide Exploration of Special Education," p. 68. Although regular education courses may serve as the primary source for special education teachers in developing curricula for students with disabilities, State standards for training special education teachers may not require experience or completion of coursework in general education. Therefore, according to Sands, Adams, and Stout, special education "teachers may not have the foundations, frameworks, and processes necessary for curriculum development." Ibid., p. 68.

[27] *See* H. Rep. No. 105–95, at 117 (1997).

course devoted to it, but due to the restrictions of credit hours and general education requirements, the topic had to be spread across several courses and instructors." Further, among the 57 State education agencies (SEA) surveyed, 48 representatives commented on the lack of skills related to procedures involved in implementing aspects of the IDEA. The representatives also noted that consultation skills are becoming a priority; yet, over one-fourth of the SEA representatives considered training programs to be unresponsive to developing those skills.[28] Another study, conducted in 1994, revealed that conferring and consulting skills were believed to be among the three most important sets of teaching competencies among teachers of students with behavior disorders and serious emotional disturbances; yet, these teachers reported receiving the lowest level of training in this area.[29]

There is concern that many new graduates of special education teacher training programs lack skills in developing individualized education programs, participating in multidisciplinary team meetings, understanding the concept of due process, consulting with regular education teachers, and communicating with parents.[30] Another concern is that the problems of training compound problems of teacher burnout and attrition. According to some studies, poor teacher training affects teacher relations with students with disabilities, their parents, regular education teachers, and other personnel serving students with disabilities. It can have negative consequences on special education teachers in terms of general job dissatisfaction and lead to higher rates of attrition.[31]

Education researchers and scholars have cited State certification standards as one reason for ineffective teacher training and preparation. State departments of education have been a major influence on the curriculum content of teacher training programs through their control of the licensing or certification of new teaching personnel.[32] In particular, State certification policies largely are responsible for determining whether training programs are categorical or noncategorical or undergraduate or graduate,[33] and these

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[28] McLaughlin et al., "Special Education Teacher Preparation," p. 215.

[29] Louis G. Denti and Susan R. Atkinson, *Competencies and Training of Teachers of Students with Serious Emotional Disturbance* (1994), p. 30, *reproduced by* EDRS, ED# 374 087 (hereafter cited as Denti and Atkinson, *Competencies and Training of Teachers*). From these findings Denti and Atkinson conclude that "although SED students receive assistance from a number of service agencies, the SED/BD teacher is not being adequately trained in the necessary skills to work with other professionals serving these students. Instead, preservice training generally focuses on curriculum methods and modifications, and behavior management techniques." Ibid., p. 31.

[30] *See* McLaughlin et al., "Special Education Teacher Preparation," p. 215; Denti and Atkinson, *Competencies and Training of Teachers*, pp. 32–33. Denti and Atkinson note that at this time, "training to be an SED teacher is an education process, not a clinical one." They contend, however, that SED teacher training can be expanded and improved in several ways. First, it would be useful to add to preservice and inservice training coursework in consultation skills so that teachers have more training in interaction with other teachers, parents, counselors, social workers, and physicians. Second, training can be conducted onsite, using a service delivery model whereby professionals from different areas meet and exchange information and ideas at a district location. Third, more emphasis can be placed on preservice training to increase counseling skills, as many teachers surveyed felt unprepared to deal with the severity of their students' behavioral and emotional problems. Denti and Atkinson also suggest that perhaps preservice training should be interdisciplinary, with instruction provided in departments of special education, school counseling, clinical and social psychology, social work, and/or rehabilitation counseling. Ibid.

[31] *See* McLaughlin et al., "Special Education Teacher Preparation," p. 215 ("[T]he effects of this mismatch between job expectations and job market realities could lead to general dissatisfaction among special education teachers and higher attrition, both reasons for concern.").

[32] Ibid. The "overwhelming" majority of faculty consulted in a study of special education preparation perceived the requirements set by State departments of education for certification as "the sole major influence on the content of their department's training program." Ibid.

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policies usually dictate the amount of emphasis placed on specific coursework areas.[34]

The criticism is that State certification standards often do not match the realities of teaching. Research has suggested that special education training is driven not by the special education teaching profession and the needs of school districts but by certification standards.[35] There are concerns that higher education institutions, when developing special education training programs and curricula to address State certification standards, do not necessarily provide training that is appropriate or sufficient to prepare special education teachers.[36] In efforts to prepare students to meet certification requirements, some researchers contend that certain training programs fail to provide instruction relevant to practical classroom experiences. Based on their studies they suggest that although students go on to meet State standards as certified special education teachers, they may not necessarily have the practical skills and knowledge to educate students with disabilities.[37]

For example, some States award certification endorsements to teachers by specific types of disability specialties, a categorical approach, although a teacher receiving such certification may go on to instruct a class composed of students with various kinds of disabilities including disability types for which that teacher had no certification.[38] Other States award noncategorical certificates even though a teacher receiving such certification may later work in schools that have categorical disability programs where specialized training would be helpful.[39] The consequences in either situation can negatively affect the educa-

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[33] There are several models for special education certification, including categorical, which means that teachers are certified and trained to teach in a specific area or disability, and noncategorical, whereby teachers are certified according to the "level of severity" of the disability (for example, mildly handicapped, moderately handicapped or severely handicapped). *See* Sindelar and Kilgore, "Teacher Education," pp. 417–18.

[34] McLaughlin et al., "Special Education Teacher Preparation," p. 215.

[35] Ibid. *See also* Marozas and May, *Issues and Practices in Special Education*, p. 35; Sharon Hall DeFur, and Juliana M. Taymans, "Competencies Needed for Transition Specialists in Vocational Rehabilitation, Vocational Education, and Special Education," *Exceptional Children*, vol. 62, no. 1 (September 1995), p. 38; Huang et al., "State Certification," p. 55; Whitworth, "Personnel Recruitment and Retention," p. 1; Cathe Cross Maple, "Is Special Education Certification a Guarantee of Teaching Excellence?" *Exceptional Children*, vol. 49, no. 4 (January 1983), p. 309 (citing A.E. Blackhurst, "Noncategorical Teacher Preparation: Problems and Promises," *Exceptional Children*, vol. 48 (1981), pp. 197–205).

[36] *See* Marozas and May, *Issues and Practices in Special Education*, p. 35. *See also* Sharon Hall DeFur and Juliana M. Taymans, "Competencies Needed for Transition Specialists in Vocational Rehabilitation, Vocational Education, and Special Education," *Exceptional Children*, vol. 62, no. 1 (September 1995), p. 38; Huang et al., "State Certification," p. 55; Whitworth, "Personnel Recruitment and Retention," p. 1; Maple, "Is Special Education Certification a Guarantee of Teaching Excellence?" p. 309.

[37] McLaughlin et al., "Special Education Teacher Preparation," p. 215 ("SEA representatives were quick to point out that new personnel were not coming to the public schools with the full range of skills necessary to teach students [with disabilities.]"). *See also* Margaret M. Noel, Carol H. Valdivieso and Bruce C. Fuller, *Determinants of Teacher Preparation: A Study of Departments of Special Education* (College Park, MD: Institute for the Study of Exceptional Children and Youth, University of Maryland, 1985), pp. 14–15 (hereafter cited as Noel et al., *Determinants of Teacher Preparation*); Judy Smith-Davis, Philip J. Burke, Margaret M. Noel, *Personnel to Educate the Handicapped in America: Supply and Demand From a Programmatic Viewpoint* (College Park, MD: Institute for the Study of Exceptional Children and Youth, 1988), pp. 128–30 (hereafter cited as Smith-Davis et al., *Personnel To Educate the Handicapped*); Maple, "Is Special Education Certification a Guarantee of Teaching Excellence?" p. 309; Sindelar and Kilgore, "Teacher Education," pp. 417–18.

[38] *See* Maple, "Is Special Education Certification a Guarantee?" p. 309; Sinedlar and Kilgore, "Teacher Education," p. 412.

[39] Marozas and May, *Issues and Practices in Special Education*, p. 36. Both categorical and noncategorical training have been criticized for differing reasons. There have been some concerns about the training of teachers by categories of disabilities. There also have been concerns about the quality of cross-categorical or generic teachers who are trained to instruct several types of students with disabilities. A study of special education preparation included the comments and views of representatives of State education agencies (SEAs). Examples of comments made by the SEA representatives regarding the

tion provided to students with disabilities. A teacher may be instructing students with varying types of disabilities, one or more of which he or she was not certified to teach. A teacher may be instructing a class for a specific disability type when he or she has received only generalized rather than specialized training or certification to instruct students with a specific type of disability. For example, one study revealed that a number of State education representatives noted local concern about the quality of the noncategorically certified teachers. The representatives frequently noted a lack of adequate management skills in dealing with behaviorally disordered students.[40]

Research indicates that State certification standards can be inflexible to the realities of classroom experiences. It suggests that State departments of education, when creating certification requirements, are less focused on matching a teacher's training to student needs. Regardless of the type of special educational programs a school district chooses to use—categorical or noncategorical, it is important that certification standards account for the varying responsibilities special education teachers may confront so as to ensure students with disabilities instruction from sufficiently trained teachers. To do so, communication between State departments of education and school districts is necessary to facilitate a thorough understanding of teacher training needs. Congress addressed the concerns on personnel standards in the IDEA Amendments of 1997.[41] This legislation added a provision on teacher certification and training requiring paraprofessionals and assistants to be "appropriately trained and supervised in accordance with State law, regulations, or written policy in order to assist in the provision of special education and related services."[42]

There have been several suggestions for improving teacher training and preparation. One suggestion is to facilitate joint efforts at reform by those in higher education who train special education teachers and by State departments of education which create the certification requirements.[43] Studies conducted in the 1980s indicate that in States that have enacted new certification requirements designed to increase quality, many teacher trainers report that they had not participated in developing the new requirements.[44]

Another suggestion for improving special education teacher training programs is achieving agreement and emphasis on the skills and competencies that special education teachers must possess.[45] Various studies have recognized certain skills and competencies important for teachers of students with specific disabilities. For example, studies have emphasized the importance of behavior management skills in teaching students with behavior disabilities and serious emotional disturbances.[46] In recent years, there have been efforts to emphasize teacher competencies. In

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competence of new graduates included, "The absence of categorical competence is absolutely appalling over the country. . . . People are coming out of programs as generalists, but it's hard to say what in." McLaughlin et al., "Special Education Teacher Preparation," p. 215.

[40] *See* Noel et al., *Determinants of Teacher Preparation*, p. 19.

[41] Pub. L. No. 105–17, § 612(a)(15) (1997).

[42] *See id.*. § 612(15) (1997). *See also* H. Rep. No. 105–95, at 93 (1997).

[43] One study emphasizes that higher education and school bureaucracies "must work together to define roles and responsibilities and reach some consensus on programs in teacher education." McLaughlin et al., "Special Education Teacher Preparation," p. 215. The study offers one solution: "share the training of teachers by designating certain responsibilities to districts and other responsibilities to higher education." Ibid.

[44] Ibid.

[45] *See* McLaughlin et al., "Special Education Teacher Preparation," p. 215; Marozas and May, *Issues and Practices in Special Education*, p. 37; Smith-Davis et al., *Personnel to Educate The Handicapped*, pp. 140–41.

[46] Denti and Atkinson, *Competencies and Training of Teachers*, pp. 3–5, 27.

1991, 48 States were actively planning or implementing teacher competency testing programs, and 25 were developing or administering tests in specific subject areas to include special education.[47] Special education teacher competency tests are used in 20 States.[48] Fifteen States defined their criteria for teacher competency testing through published objectives which include: (a) basic knowledge and historical aspects, (b) identification and characteristics of special needs students, (c) processing skills, (d) assessment, (e) learning theory, (f) teaching strategies, (g) instructional content, (h) instructional materials, (i) administrative alternatives, and (j) ancillary services.[49]

An additional suggestion involves professional standards for special education teachers. Although the field of special education initially developed without the benefit of written professional standards, the Council for Exceptional Children began efforts to create professional standards in 1966. Since then the Council for Exceptional Children successively has issued standards for the preparation and certification of special education teachers. These standards serve as guidelines or suggestions, rather than requirements.[50] There are some arguments that the professional standards should be given more weight, perhaps through making them requirements, because as of yet, the standards have had little or no influence on defining training program standards or certification requirements.[51] It is suggested that the development of standards will enable the field of special education to be regarded as its own specialized profession.[52]

Teacher Allocation

Another problem cited in education research on educating students with disabilities has been a shortage of trained teachers.[53] The shortage is a serious concern because it potentially can lead to reduced and inadequate services for students with disabilities.[54] Data reported in the U.S. Department of Education's *Seventeenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* and its *Eighteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* reveal a continuing need for special education teachers and other support personnel to serve students with mental retardation, learning disabilities, behavior disabilities, and serious emotional disturbance.[55] From the 1992–1993 school year to the 1993–1994 school year, there was a small increase, 6.5 percent, in the overall number of special education teachers employed to serve students ages 6 through 21 under Part B of the IDEA and Chapter 1 of the Elementary and Secondary Education Act.[56] For the 1993–1994 school year, the largest special education teacher category was the learning disabilities category, which represented nearly one-third of the special education teachers employed to serve students between the ages 6 and 21.[57]

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[47] Bob Algozzine and Roberta S. Ramsey, "Teacher Competency Testing: What are Special Education Teachers Expected to Know?" *Exceptional Children*, vol. 57 (February 1991), p. 339.

[48] Ibid.

[49] Ibid.

[50] Marozas and May, *Issues and Practices in Special Education*, pp. 38–39; Harold Heller and Nancy Ridenhour, "Professional Standards: Foundation for the Future," *Exceptional Children*, vol. 49, no. 4 (January 1983), p. 295 (hereafter cited as Heller and Ridenhour, "Professional Standards"). The most recent standards were issued in 1996. *See* The Council for Exceptional Children, *What Every Special Educator Must Know: The International Standards for the Preparation and Certification of Special Education Teachers* (Reston, VA: Council for Exceptional Children, 1996).

[51] McLaughlin et al., "Special Education Teacher Preparation," p. 215 ("At present, efforts to develop competency statements and professional standards appear to have had minimal or no influence on defining program standards or certification requirements."); Heller and Ridenhour, "Professional Standards," pp. 297–98. However, the Council for Exceptional Children standards have been criticized because they appear to promote the categorical approach to special education teacher education and certification. *See* Sindelar and Kilgore, "Teacher Education," p. 418.

[52] Heller and Ridenhour, "Professional Standards," pp. 298–99.

[53] *See* Urban Teacher Collaborative, *The Urban Teacher Challenge: A Report on Teacher Recruitment and Demand in Selected Great City Schools*, May 1996, p. 1; Kusum Singh and Bonnie S. Billingsley, "Intent to Stay in Teaching," *Remedial and Special Education*, vol. 17, no. 1 (January 1996), p. 37; Sindelar and Kilgore, "Teacher Education," pp. 419–21; Bonnie S. Billingsley, "Teacher Retention and Attrition in Special Education and General Education: A Critical Review of the Literature," *The Journal of Special Education*, vol. 27, no. 2 (1993), p. 137; Noel et al., *Determinants of Teacher Preparation*, p. 12; Smith-Davis et al., *Personnel to Educate The Handicapped*, pp. 48–55.

[54] Singh and Billingsley, "Intent to Stay in Teaching," p. 37.

The increased number of special education teachers, however, has not overcome the need for more special education teachers. In the 1993–1994 school year, 24,697 additional full-time special education teachers were needed to teach students with disabilities. This number was less than in the previous year, when 25,829 additional full-time special education teachers were needed. Of the 1992–1993 total teachers needed,[58] 7,075 full-time special education teachers were needed to instruct students with learning disabilities; 3,011 were needed to instruct students with mental retardation; 4,556 were needed to instruct students with serious emotional disturbance; 216 were needed to teach students with other health impairments, which might include students with behavior disorders, and 6,036 were needed to teach classes that served students with varying disabilities (see table 8.2). Various studies show that the impact of the special education personnel shortage is most severe in rural and urban school districts and for teachers trained to instruct students with low incidence disabilities, such as serious emotional disturbance and severe, multiple disabilities.[59] Congress addressed the shortage of qualified teachers in the IDEA Amendments of 1997. This legislation allows States to adopt policies requiring LEAs to "make an ongoing good-faith effort to recruit and hire appropriately and adequately trained personnel to provide special education and related services to children with disabilities, including, in a geographic area of the State where there is a shortage of such personnel, the most qualified individuals available who are making satisfactory progress toward completing applicable course work necessary to meet State standards within three years."[60]

The special education teacher shortage has been attributed to a number of causes. One major cause has been a high rate of attrition for special education teachers, particularly in rural areas[61] and among teachers of students with certain types of disabilities, such as serious emotional disturbance.[62] The attrition has occurred as the

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[55] DOEd, *1995 IDEA Report*, pp. 28–33; DOEd, *Eighteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, DC: U.S. Department of Education, 1995), pp. 20–26 (hereafter cited as DOEd, *1996 IDEA Report*). *See also* tables 8.2 and 8.3. Shortages are not limited to teachers. Other professionals who work with students with disabilities also are in short supply. *See* Sindelar and Kilgore, "Teacher Education," pp. 420–21.
Some studies have indicated that the area of learning disabilities is the only area that has begun to show a surplus of teachers, particularly in suburban communities. McLaughlin et al., "Special Education Teacher Preparation," p. 215. However, data collected by the U.S. Department of Education for the 1992–1993 school year show that the greatest need for special education teachers is for teachers of students with specific learning disabilities. *See* table 8.2.

[56] DOEd, *1996 IDEA Report*, p. 22.

[57] Ibid., p. 23. *See* table 8.1.

[58] The Department of Education did not disaggregate the number of teachers needed by disability for the year 1993–1994.

[59] Huang et al., "State Certification," p. 2; Cheney and Demchak, "Preparing Rural Educators," p. 137. *See also* Urban Teacher Collaborative, *The Urban Teacher Challenge: A Report on Teacher Recruitment and Demand in Selected Great City Schools*, May 1996, p. 1 (noting that special education is the teaching area in greatest demand in urban school districts).

[60] Pub. L. No. 105–17, § 612(a)(15)(C) (1997).

[61] *See* Billingsley, "Teacher Retention," pp. 138, 140–41; Smith-Davis et al., *Personnel to Educate The Handicapped*, pp. 57–59; Noel et al., *Determinants of Teacher Preparation*, p. 15 (reporting on these studies).

TABLE 8.1

Special Education Teachers Employed to Serve Students Age 6 Through 21 Served Under Part B of the IDEA and Chapter 1 of the Elementary and Secondary Education Act, 1993-1994 School Year[1]

Disability	FTE teachers[2]
Specific learning disabilities	92,750
Speech or language impairments	37,462
Mental retardation	41,872
Serious emotional disturbance	29,779
Multiple disabilities	7,638
Hearing impairments	6,023
Orthopedic impairments	2,293
Other health impairments	2,304
Visual impairments	3,872
Autism	1,703
Deaf-blindness	115
Traumatic brain injury	133
Cross-categorical[3]	89,035
Total	331,392

[1] The figures do not include regular education teachers and other staff who provide services to students with or without disabilities as part of the general education program.

[2] Data reported in full-time equivalent (FTE) teacher positions. They include both fully-certified and not fully-certified teachers.

[3] Teachers in cross-categorical programs teach classes with students having varying disabilities.

Source: U.S. Department of Education, *Seventeenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, DC: U.S. Department of Education, 1995), p. 29.

number of students enrolled in special education programs has increased over the years. Overall, between 1976–1977 and 1993–1994, enrollment of students with disabilities served in public schools increased from 3.7 million to 5.4 million. In 1993–1994, 11.8 percent of all students were served in federally supported special education programs, up from 8.3 percent in 1976–1977.[63] The result has been a growing demand for special education teachers as the number of persons remaining in the special education teaching field declines.[64]

To address the problem of special education teacher shortages, some State and local school

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62 *See* Singh and Billingsley, "Intent to Stay in Teaching," p. 37; Noel et al., *Determinants of Teacher Preparation*, p. 15; Sindelar and Kilgore, "Teacher Education," pp. 421–22; Smith-Davis et al., *Personnel to Educate The Handicapped*, p. 52 (noting that among the 54 jurisdictions in the survey, 33 reported consistent shortages of personnel to educate emotionally disturbed/behaviorally disordered students and that, coupled with shortages in severe emotional disturbance reported by 28 jurisdictions, "the findings suggest that mild to severe emotional disturbance is the single most vulnerable program area in special education where manpower is concerned").

63 *See* DOEd, National Center for Education Statistics, *Digest of Education Statistics*, by Thomas Snyder et al. (Washington, DC: Government Printing Office, October 1995), table 51, p. 65 and table 3, p. 12; DOEd, National Center for Education Statistics, *Condition of Higher Education 1996*, by Thomas Smith et al. (Washington, DC: Government Printing Office, June 1996), table 38–1, p. 262 and table 43–1, p. 272.

64 *See* Billingsley, "Teacher Retention," p. 138.

TABLE 8.2
Additional Special Education Teachers Needed to Serve Students with Disabilities Ages 6 Through 21, 1992-1993 School Year[1]

Disability	Number of FTE teachers needed[2]	Percentage of all teachers needed
Specific learning disabilities	7,075	27.4
Speech or language impairments	2,729	10.6
Mental retardation	3,011	11.7
Serious emotional disturbance	4,556	17.6
Multiple disabilities	790	3.1
Hearing impairments	509	2.0
Orthopedic impairments	234	0.9
Other health impairments	216	0.8
Visual impairments	242	0.9
Autism	382	0.1
Deaf-blindness	20	0.1
Traumatic brain injury	29	0.1
Cross-categorical[3]	6,036	23.4
Total	25,829[4]	100.0[5]

[1] These figures include: (1) the number of *unfilled* vacancies in funded positions that occurred during the 1992-1993 school year (12 months), and (2) the number of additional personnel that were needed during the 1992-1993 school year (12 months) to fill positions occupied by persons who were not fully certified or licensed. These figures include additional personnel needed by public and private agencies.

[2] Data reported in full-time equivalent (FTE) teacher positions.

[3] Teachers in cross-categorical programs teach classes with students having varying disabilities.

[4] The total FTE may not equal the sum of the individual disability categories because of rounding.

[5] Percentages may not total 100 percent because of rounding.

Source: U.S. Department of Education, *Seventeenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, DC: U.S. Department of Education, 1995), p. 32.

districts have developed strategies to speed the entry of teachers into the work force. These strategies have enabled yet-uncertified teachers to perform educational service for a specified time period, during which they must engage in training or otherwise fulfill the criteria that are missing or originally were insufficient.[65] Some States and school districts have begun to offer emergency or provisional certifications.[66] For example, the Houston Independent School District implemented an alternative special education certification program in collaboration with a university, in which 24 teachers were placed in special education classrooms for children with severe behavioral/autistic problems through an alternative certification program.[67] Some States have

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65 Smith-Davis et al., *Personnel to Educate The Handicapped*, p. 128.

66 *See* Mary Cihak Jensen, Susan A. Mortorff, and Susan Pellegrini Meyers, "On-the-Job Training: Is It the Answer to a Special Education Personnel Shortage?" *Teacher Education Quarterly* (Summer 1992), p. 91 (hereafter cited as Jensen et al., "On-the Job Training"); Marozas and May, *Issues and Practices in Special Education*, p. 35; Noel et al., *Determinants of Teacher Preparation*, p. 14; Smith-Davis et al., *Personnel to Educate The Handicapped*, p. 128; Maple, "Is Special Education Certification a Guarantee of Teaching Excellence?" pp. 310–11. In California, emergency certification allows an individual who has completed the requirements for a preliminary basic elementary or secondary teaching credential plus six semester hours of introductory special education coursework to assume responsibility for service delivery to students with learning disabilities and/or severe disabilities as semester units of training. Jensen et al., "On-the-Job Training," p. 93.

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TABLE 8.3
Special Education Personnel Other than Special Education Teachers Employed and Needed to Serve Students with Disabilities Ages 3 Through 21, 1992-1993 School Year[1]

Type of personnel	FTE personnel employed	FTE personnel needed
School social workers	9,658	590
Occupational therapists	4,973	749
Recreational therapists	389	107
Physical therapists	3,504	583
Teacher aides	178,532	5,000
Physical education teachers	5,283	364
Supervisors/administrators (LEA)	15,791	1,176
Other non-instructional staff	24,772	1,284
Psychologists	20,138	1,215
Diagnostic staff	7,178	468
Audiologists	883	83
Work study coordinators	1,568	358
Vocational education teachers	4,481	313
Counselors	7,297	449
Supervisors/administrators (SEA)	1,064	130
Nonprofessional staff	34,908	1,234
Total FTE	320,420	14,103

[1] These figures include: (1) the number of *unfilled* vacancies in funded positions that occurred during the 1992-1993 school year (12 months), and (2) the number of additional personnel that were needed during the 1992-1993 school year (12 months) to fill positions occupied by persons who were not fully certified or licensed. These figures include additional personnel needed by public and private agencies.

Source: U.S. Department of Education, *Seventeenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (Washington, DC: U.S. Department of Education, 1995), p. 31.

granted waivers of special education certification requirements.[68] Other States have relied on internship programs that provide on-the-job training while allowing the student to complete coursework in special education teaching.[69]

Although at least one study of two alternative certification programs found the programs to be "a viable option for the preparation of special education personnel,"[70] there remain concerns that strategies such as provisional certification,

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67 Huang et al., "State Certification," p. 54 (citing D. Stafford, *A Special Education Alternative Certification Program* (Houston, TX: Houston Independent School District, 1990)).

68 *See* Jensen et al., "On-the-Job Training," p. 91; Maple, "Is Special Education Certification a Guarantee of Teaching Excellence?" pp. 309–10.

69 For example, in California, the specialist internship program allows individuals who have obtained a preliminary basic teaching credential but no special education coursework to enroll in a structured 2-year program of coursework, support, and supervision. Jensen et al., "On-the-Job Training," p. 93.

70 Barbara L. Ludlow and Wilfred D. Wienke, "Alternative Certification in Special Education: A Qualitative Study of Two Models," in Diane Montgomery, ed., *Rural Partnerships: Working Together* (paper prepared for Proceedings of the Annual National Conference of the American Council on Rural Special Education, Austin, TX, Mar. 23–26, 1994), p. 157, *reproduced*

waiver, and internship programs compromise the quality of trained personnel.[71] For example, one study found that shortages of special education teachers frequently resulted in the hiring of teachers with nonspecialized special education certifications to teach students with low incidence disabilities. According to the authors of this study, "these teachers are teaching in areas for which they do not hold an appropriate license and do not possess the necessary competencies to provide appropriate educational services to students with serious emotional disturbances or severe, multiple disabilities."[72] In addition to this concern, provisional certifications, waivers, and internships may not significantly address the teacher shortage problem on a long-term basis.[73] A study of California's emergency certification and internship problems revealed that these on-the-job training structures can potentially discourage trainees' commitment to special education by exposing newcomers to challenges beyond their abilities.[74]

A review of educational literature and research shows that, at the local school district and State levels, there has been recognition of problems in ensuring that students with disabilities have adequate numbers of teachers to meet their educational needs. Although school districts, educational institutions, and State education agencies have devised some strategies to address special education teacher shortages, there remain concerns that these strategies are only short-term solutions that often compromise the quality of teaching. The problem of teacher shortages, therefore, is interrelated to overall problems of quality instruction and teacher training and certification. There are already concerns that standard special education teacher training programs and certification requirements do not place sufficient emphasis on certain "real-life" skills such as curriculum development, consultation, team teaching, development of IEPs, and communication with parents.

Special Education Teacher and Staff Training and Certification: OCR's Enforcement Efforts

The section 504 regulations do not address teacher training, certification, or allocation. Appendix A to the regulations indicates that an appropriate education means that the teacher of a student with a disability "must be trained in the instruction of persons with the [disability] in question."[75] This interpretation clarifies that to comply with section 504, a school district must provide teachers who are trained to teach persons

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by EDRS, ED# 369 603. This study compared the alternative certification programs operated by the Houston Independent School District and the San Jose State University. Project staff in both programs asserted the superiority of the orientation-instruction-mentoring-supervision-trainee cohort core structure of each program over the typical inservice training offered to special education teachers working on emergency or provisional teaching permits. Staff and trainees in both programs felt the programs provided a support system for new teachers and promoted effective learning. All participants in the programs recommended alternative certification options as effective methods for addressing teacher shortages and attracting qualified individuals. Ibid.

[71] *See* Noel et al., *Determinants of Teacher Preparation*; Huang et al., "State Certification," pp. 54–55 (Huang and others agree that "a concerted effort should be made to examine the feasibility of alternative certification programming for certain areas of personnel in special education and related services." They offer, as an example, a school nurse or community health care specialist who applies for a position to provide educational services to children with complex medical needs through an alternative certification route. However, they say that the traditional teacher certification programs may be the most effective education program to train teachers of students with certain disabilities, such as visual impairments.).

[72] Cheney and Demchak, "Preparing Rural Educators," p. 138.

[73] *See* Jensen et al., "On-the-Job Training," p. 100.

[74] Ibid. The authors found that under both programs, the trainees assume roles and responsibilities identical to the fully trained, experienced teacher specialists. Ibid. p. 93.

[75] *See* 34 C.F.R. pt. 104, app. A, no. 23 (1995). *See also* Office for Civil Rights (OCR), DOEd, *OCR Handbook For The Implementation of Section 504 of The Rehabilitation Act Of 1973* (April 1981), p. 240.

with a student's particular disability. Beyond this clarification, there is no further policy guidance or memoranda addressing training for special education teachers and other school staff. OCR has addressed some training issues in complaint investigations and compliance reviews. For example, it has looked at the training necessary for a special education teacher to provide a student with a disability a free appropriate public education. It has examined the effect of a State's award of temporary, provisional, or emergency certifications and certification waivers to special education teachers on section 504 compliance. It also has considered whether noncategorical special education certifications ensure that teachers have the necessary training for compliance with section 504.

Training and Certification

On the topic of teacher training, OCR generally determines whether a teacher instructing a student with a disability is trained to instruct students with the particular type of disability in question. OCR considers the State's rules and guidelines in determining whether a teacher has sufficient training to provide an appropriate education to students with disabilities.[76] Because of the emphasis on training for "the disability in question," OCR has found that a school district did not satisfy section 504 requirements when the teachers had only general degrees or coursework in special education and lacked certification to teach students with the particular disability in question.[77]

Section 504 specifies no Federal requirements for the certification of teachers of persons with disabilities.[78] In at least one case letter, OCR has noted that "[a]n appropriate education includes the opportunity for handicapped students to receive instruction services from a *certified* teacher,"[79] but in other cases OCR has not found the lack of a formal certification for the particular disability a *per se* violation of section 504. It has approached each case individually based on the specific facts and circumstances.[80] When a teacher has had some specialized training, although no formal certification, for the particular disability type, OCR usually has determined the school district to be in compliance with section 504.[81] When a State has permitted teachers who were formally uncertified to teach students with disabilities under waivers or temporary certificates, OCR generally has not found a violation of section 504 as long as the teachers met the State standards.[82]

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[76] *See, e.g.*, Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DOEd, letter to James King, Superintendent, Walton County School District, DeFuniak Springs, FL, re: Complaint No. 04–95–1185, June 16, 1995, *reprinted in* 23 IDELR 360; OCR, Region IV, DOEd, letter to John Railford Key, Superintendent, Pike County School District, Troy, AL, re: Complaint No. 04–89–1286, Jan. 18, 1990, *reprinted in* 16 EHLR 807; Richard V.E. McCann, Regional Director, OCR, Region I, DOEd, letter to the John H. Lawson, Commissioner of Education, State Department of Education, Quincy, MA, re: Complaint No. 01–83–1005, June 26, 1985, *reprinted in* 352 EHLR 01, 02.

[77] *See* Gary D. Jackson, Regional Civil Rights Director, OCR, Region X, DOEd, letter to Bill Thornton, Superintendent, Mansfield School District No. 207, Mansfield, WA, re: Complaint No. 10–94–1140, Apr. 19, 1995, *reprinted in* 22 IDELR 1050, 1051–53; Jesse L. High, Acting Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Billy Salter, Interim Superintendent, Mobile County School District, Mobile, AL, re: Complaint No. 04–86–1191, Nov. 17, 1986, 352 EHLR 345–46.

[78] OCR Complaint No. 01–83–1005, June 26, 1985, *reprinted in* 352 EHLR 01, 02.

[79] Linda A. McGovern, Acting Regional Director, OCR, Region V, DOEd, letter to Martin Kinert, Superintendent, Special Education District of McHenry County, Woodstock, IL, re: Case No. 05–85–1079, Aug. 23, 1985, *reprinted in* 352 EHLR 125, 127 (emphasis added). In that case, OCR found the school district in violation of section 504 because it had used the services of an aide to instruct students with behavior disorders instead of the services of a certified teacher. Ibid.

[80] For example, where the special education teacher was unavailable due to leave of absence and the school district provided a substitute teacher, OCR considered a number of factors, including the training and certification of the substitute, the school district's efforts to replace the substitute with an appropriately trained and certified teacher, and whether instruction under the substitute denied the student an appropriate education. Judith E. Banks, Regional Civil Rights Director, OCR, Region VII, DOEd, letter to Ronald Rebore, Superintendent, Special School District of St. Louis County, Town and Country, MO, re: Complaint No. 07–90–1032, May 2, 1990, *reprinted in* 16 EHLR 1195, 1196.

[81] *See* Kenneth A. Mines, Regional Director, OCR, DOEd, letter to Margaret C. Goldthorpe, Superintendent, Tahquamenon

As noted above, some educational researchers have raised concerns about certain State certification standards, such as provisional, temporary, or emergency certifications, waiver programs, and categorical and noncategorical teaching certificates. The general concern with respect to provisional, temporary, or emergency certifications and waiver programs is that by allowing teachers to teach without having met formal requirements, States may be compromising the quality of teachers and providing students with disabilities teachers who do not have the training necessary to ensure appropriate educational instruction.[83] In 1986, OCR investigated a complaint against the Mississippi Department of Education (MSDE) alleging that MSDE permitted a school district to employ unqualified speech and language personnel, thus denying students with disabilities appropriate educational services. In conducting its investigation, OCR reviewed documentation showing that MSDE had authority in accordance with State law to issue emergency teaching certificates. In addition, MSDE had certain competency requirements for those receiving emergency certificates, including possession of an undergraduate degree, completion of a certain number of hours in graduate course work and clinical practicum in Speech-Language Pathology, and continued progress toward full certification. Because the school district in question was confronted by a shortage of certified teachers, and the teachers who were granted emergency certification met the State requirements for receiving the certificate, OCR concluded that MSDE did not violate section 504 by granting the emergency certifications.[84]

The general concern with respect to categorical and noncategorical teaching certifications is that those types of certificates may permit a teacher to instruct students with disabilities even though he or she lacks appropriate specialized training or certification to instruct some or all of the students.[85] Because section 504 requires a teacher to

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Area Schools, Newberry, MI, re: Complaint No. 15–92–1168, Dec. 24, 1992, *reprinted in* 19 IDELR 647, 648–49 (The student had severe multiple impairments and initially was classified as trainable mentally impaired. The IEP committee later determined that the student had a secondary disability of emotional impairment. The student's teacher had received certification to teach students with mental impairments but did not possess certification to instruct emotionally impaired (EI) students. OCR found, however, that the teacher did receive some preservice training in the instruction of EI students; in addition, she had attended seminars that provided training in the instruction of EI students. OCR, therefore, determined that the student's education program was implemented by appropriately trained personnel and concluded that the school district did not violate section 504 regarding the provision of trained teachers.); Judith E. Banks, Regional Civil Rights Director, OCR, Region VII, DOEd, letter to Ronald Rebore, Superintendent, Special School District of St. Louis County, Town and Country, MO, re: Complaint No. 07–90–1032, May 2, 1990, *reprinted in* 16 EHLR 1195, 1196 (OCR did not find a violation of section 504 where there was evidence that the teacher of a student with a behavioral disorder and learning disability had a provisional certification in the area of LD/BD for grades kindergarten through 12 and was trained in the instruction of persons with LD/BD conditions).

[82] *See* Archie B. Meyer, Regional Civil Rights Director, OCR, Region IV, DOEd, letter to W.R. Townsend, Superintendent, Jackson County School District, Scottsboro, AL, re: Complaint No. 04–95–1459, Oct. 16, 1995, *reprinted in* 23 IDELR 1149, 1150 (OCR found that the teachers providing the student with his emotional conflict services were not certified as EC teachers, although they would be certified in 3 years or less and had met the requirements for a waiver.); Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DOEd, letter to James King, Superintendent, Walton County School District, Defuniak Springs, FL, re: Complaint No. 04–95–1185, June 16, 1995, *reprinted in* 23 IDELR 360; Jesse L. High, Acting Regional Director, OCR, Region IV, DOEd, letter to Richard A. Boyd, Superintendent, Mississippi Department of Education, Jackson, MS, re: Complaint No. 04–86–1119, July 15, 1986, *reprinted in* 352 EHLR 279, 279–81.

[83] *See* pp. 270–72 above. *See also* Noel et al., *Determinants of Teacher Preparation*; Huang et al., "State Certification," pp. 54–55.

[84] OCR Complaint No. 04–86–1119, July 15, 1986, *reprinted in* 352 EHLR 279, 279–81.

[85] *See* pp. 270–72 above. *See also* Marozas and May, *Issues and Practices in Special Education*, p. 36; McLaughlin et al., "Special

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be trained in a student's particular disability, questions also have arisen about categorical and noncategorical teaching certificates and their legal validity under section 504. OCR has addressed both of these issues in a complaint investigation. In 1985, OCR investigated a complaint against the Massachusetts Department of Education (MDE) over its certification standards. Because Massachusetts follows a noncategorical system,[86] MDE did not award certifications for particular disabilities, such as specific learning disabilities. Instead, a teacher could receive certification as (1) a generic consulting teacher, (2) a teacher of school age children with moderate special needs, or (3) a teacher of children with severe special needs. Through its factfinding, OCR learned that to receive certification teachers had to complete a course of study approved by MDE. In addition, course work offered by various institutions was specifically approved by MDE teams, and it had to include instruction to provide competency in all disability conditions that came under the teacher's area of certification. OCR, therefore, determined that the State was providing a mechanism to assure competency, and it found MDE in compliance with section 504.[87]

The two OCR cases discussed above reveal that OCR's approach in analyzing State teacher training policies and standards has been to ensure that there is some mechanism to assure teacher competence. When a State required in its standards at least minimum criteria, such as possession of a bachelor's degree and completion of certain minimum hours of graduate course work in a specialized area, OCR generally has found the State standards in compliance with section 504.

The lack of a consistent, formal standard for compliance on teacher training, however, makes it unclear what approaches OCR has and generally will follow on teacher training issues. In some cases, OCR has implied that compliance with State requirements would meet the section 504 requirement, meaning that a teacher had to be certified whether formally or provisionally.[88] In other cases, State standards were not dispositive on the issue.[89] In analyzing State policies and standards, OCR has looked to see that there is some means built into the State requirements to ensure that a teacher had competence in the specialized area of instruction. Overall, however, OCR has not established what criteria will mean that a special education teacher is sufficiently trained to provide an appropriate education to students with disabilities. One factor that could assist OCR in fashioning a formal compliance standard would be agreement among the States and the teaching profession on the minimum training and competency standards necessary to provide an appropriate education to students with disabilities. To date, there has been some agree-

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Education Teacher Preparation," p. 215.

[86] The Code of Massachusetts Regulations does not base eligibility for special education on categories of disabilities. Instead, a student need only be a "[c]hild in need of special education." A "[c]hild in need of special education" is "a child who has been determined to need special education . . . based upon a finding that a child, because of a disability consisting of a developmental delay or an intellectual, sensory, neurological, emotional, communication, physical, specific learning or health impairment or combination thereof, is unable to progress effectively in regular education and requires special education services in order to successfully develop the child's individual educational potential. Mass. Reg. Code tit. 603, § 28.104.0(a) (1996).

[87] OCR Complaint No. 01–83–1005, June 26, 1985, *reprinted in* 352 EHLR 01, 02–03.

[88] *See* Linda McGovern, Acting Regional Director, OCR, Region V, DOEd, letter to Martin Kinert, Superintendent, Special Education District of McHenry County, Woodstock, IL, re: Case No. 05–85–1079, Aug. 23, 1985, *reprinted in* 352 EHLR 125, 127 ("[a]n appropriate education includes the opportunity for handicapped students to receive instruction services from a *certified* teacher.") (emphasis added).

[89] *See* Kenneth A. Mines, Regional Director, OCR, DOEd, letter to Margaret C. Goldthorpe, Superintendent, Tahquamenon Area Schools, Newberg, MI, re: Complaint No. 15–92–1168, Dec. 24, 1992, *reprinted in* 19 IDELR 647, 648–49; Judith E. Banks, Regional Civil Rights Director, OCR, Region VII, DOEd, letter to Ronald Rebore, Superintendent, Special School District of St. Louis County, Town and Country, MO, re: Complaint No. 07–90–1032, May 2, 1990, *reprinted in* 16 EHLR 1195, 1196.

ment among education researchers on the competencies needed for special education teachers. In addition, professional standards exist though not formally adopted by States.[90] However, no consensus exists between and among the educational institutions that train special education teachers, the State education agencies that develop certification requirements, and the special education teaching professionals generally.[91]

Allocation

On teacher and staff allocation issues, the section 504 regulations do not set forth requirements on student to teacher or aide ratios or the maximum number of students with disabilities that one teacher may instruct at a time.[92] OCR has not created a formal policy to address student to teacher or aide ratios under section 504. In a 1994 case letter, however, it noted that "the regulations implicitly presume that the number of students with disabilities that can be instructed by one teacher at one time must be reasonable."[93]

Because of the lack of formal policy on teacher and staff allocation, OCR's analytical approach and compliance standards were examined through a review of case letters dealing with teacher and staff allocation issues. In its complaint investigations and compliance reviews, OCR has looked to State education agency and local school district policies as guidelines on teacher and staff allocation.[94] However, its analysis for determining section 504 compliance primarily has focused on identifying (1) what teacher(s) and other staff are necessary to provide the student with a free appropriate public education as required by 34 C.F.R. section 104.33(a) and (b), and (2) whether the teacher(s) and staff were provided.

In situations where a school district has developed an IEP for a student, OCR has considered whether a school district provided the necessary teachers and other staff to implement the student's IEP. For example, where a complainant alleged that a school's assignment of students with disabilities to classes did not follow guidelines with regard to the ratio of students to teachers and aides, OCR considered the State guidelines with the school's actual practice. In that case, the Florida State Board of Education policy left student to teacher or aide ratios to the discretion of the school district. OCR found that the largest special education class at the school had 18 students with one teacher and one part-time aide assigned to the class. In interviewing two of the three special education teachers at the school, OCR found that the teachers did not believe that the class size precluded effective implementation of the students' IEPs. From its investigation OCR did not find sufficient evidence to support a finding of a section 504 violation.[95]

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[90] *See* pp. 272–74 above.

[91] *See* ibid.

[92] Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DOEd, letter to William S. Coker, Superintendent, Conecuh County School District, Evergreen, AL, re: Complaint No. 04–94–1036, Apr. 7, 1994, *reprinted in* 21 IDELR 805, 805–06 (hereafter cited as OCR Complaint No. 04–94–1036, 21 IDELR 805).

[93] Ibid., pp. 805–06.

[94] *See* Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DOEd, letter to James King, Superintendent, Walton County School District, DeFuniak Springs, FL, re: Complaint No. 04–95–1185, June 16, 1995, *reprinted in* 23 IDELR 360, 360–61 (hereafter cited as Complaint No. 04–95–1185, 23 IDELR 360); Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DOEd, letter to William S. Coker, Superintendent, Conecuh County School District, Evergreen, AL, re: Complaint No. 04–94–1036, Apr. 7, 1994, *reprinted in* 21 IDELR 805, 805–06; OCR, Region IV, DOEd, letter to John Railford Key, Superintendent, Pike County School District, Troy, AL, re: Complaint No. 04–89–1286, Jan. 18, 1990, *reprinted in* 16 EHLR 807; Linda A. McGovern, Acting Regional Director, OCR, DOEd, letter to Leonard Demak, Superintendent, Oak Park Public Schools, Oak Park, MI, re: Complaint No. 15–86–1043, Oct. 22, 1986, *reprinted in* 352 EHLR 292, 293.

[95] Complaint No. 04–95–1185, 23 IDELR 360, 360–61. *See also* Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Robert Bushong, Superintendent, Muscogee County School District, Columbus, GA, re: Complaint

Even when a school district has met a State's minimum requirements for the teacher or aide to student ratio, there sometimes have been circumstances in which OCR found that the district did not satisfy the section 504 requirement to provide each student with a free appropriate public education.[96] For example, in one case the district met the State minimum requirement for paraprofessionals to student ratio. Under that requirement, a class of six profoundly mentally disabled students must have at least one special education teacher and one paraprofessional. OCR found that one certified special education teacher and two paraprofessionals were assigned to the student's class of six mentally disabled students. However, the special education teacher indicated that the presence of two paraprofessionals in the classroom was necessary to implement the student's IEP. OCR found that classroom attendance by both paraprofessionals was very sporadic. It noted that "[g]iven the frequent absence of the paraprofessionals assigned to this class and the particular needs of the six students assigned to this class, the teacher could not fully implement the Student's IEP." OCR, therefore, concluded that the district denied the student a free appropriate education when it could not provide her with the amount of community-based training specified in her IEP.

As special education teacher shortages have been a continuing problem for school districts nationwide, at least one school district in an OCR case has pointed to the lack of qualified certified teacher applicants available as its reason for failing to provide a teacher certified to teach students with learning disabilities. In that case, OCR looked to the State's procedures when there were not qualified applicants available. Under the State requirements, a school district was supposed to request a waiver or temporary certificate for the uncertified teacher, and the teacher filling the vacancy was supposed to be certified in special education and enrolled in courses leading to the specialized field. OCR found that the school district had not requested waivers or temporary certificates for the two noncertified teachers and, therefore, concluded that the school district denied the students an appropriate education by failing to provide appropriately certified teachers.[97]

Incorporation of Teacher and Staff Training Into Remedies

OCR may incorporate teacher and staff training into remedies for problems found in a school district's referral of students to special education or the referral process generally.[98] For example, in one case OCR found a school district in violation of the section 504 regulations because the school district had referred students to a separate school housing disabled and nondisabled students and denied the students permission to attend their home schools because of disciplinary problems. OCR found that all students placed in the school were labeled as "emotionally conflicted" students.[99] The school district made this referral

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No. 04–94–1254, May 1, 1995, *reprinted in* 22 IDELR 1138, 1139; Linda A. McGovern, Acting Regional Director, OCR, DOEd, letter to Dr. Leonard Demak, Superintendent, Oak Park Public Schools, Oak Park, MI, re: Complaint No. 15–86–1043, Oct. 23, 1986, *reprinted in* 352 EHLR 292, 293 (OCR found that there was a shortage of technicians and aides at the center due to vacancies and absences and that this shortage together with the fact that there was a limited pool of substitutes available resulted in the failure to implement the IEPs for the students. OCR concluded that the school district violated section 504 by failure to implement the students' IEPs.).

[96] Complaint No. 04–95–1185, 23 IDELR 360, 360–61.

[97] OCR, Region IV, DOEd, letter to Billy Salter, Superintendent, Mobile County School District, Mobile, AL, re: Complaint No. 04–90–1052, Mar. 30, 1990, *reprinted in* 16 EHLR 910, 911–12.

[98] *See* Norma Cantú, Assistant Secretary for Civil Rights, OCR, DOEd, memorandum to All Staff, "Minority Students and Special Education," July 6, 1995, Policy Codification Document No. 00291, pp. 9, 11 (hereafter cited as OCR, "Minority Students and Special Education" Policy).

[99] Jesse L. High, Acting Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Billy Slater, Interim Superintendent, Mobile County School District, Mobile, AL, re: OCR Complaint No. 04–86–1191, Nov. 17, 1986, 352 EHLR 338, 339, 342.

without conducting an evaluation to determine whether the students needed special education services. OCR recommended that the school district institute some form of districtwide mandatory inservice training for teachers and administrators on the discipline of students with disabilities. In its letter of finding OCR noted, "This training should instruct District staff on ways to identify students with behavior problems which may be caused by a handicapped condition, and specify the procedures to utilize in the home school before the student's behavior reaches the point where CLC referral is needed."[100] OCR also recommended that the school district use the services of OCR's technical assistance unit in the planning and/or presentation of workshop activities.[101]

Regular Education Teachers

Federal requirements and policy initiatives to place students with disabilities in the least restrictive environment have brought new challenges to the regular education teacher and other school personnel. Often, the regular education teacher now must instruct students with differing types of disabilities in a setting with nondisabled students. Naturally, concerns have arisen over whether regular education teachers have adequate training to instruct students in the increasingly diverse classroom environment.[102]

Studies have looked into the extent of specialized training offered to regular education teachers and other school district staff. One study conducted in 1990 found that 71 percent of the 50 States require special education coursework for the initial certification of regular education teachers. However, only nine States, or 17 percent, require special education coursework for recertification of regular education teachers.[103] A 1992 study of 58 postsecondary education departments in New York State concluded that schools of education did not provide sufficient coursework and field experience to prepare prospective general education teachers for classrooms having both students with and students without disabilities. Less than one-third of the programs surveyed were accredited by the National Council for Accreditation of Teacher Education, the major accreditation association in the United States for postsecondary schools of education. In addition, less than one-third offered dual certification in regular and special education, required training in collaborative teaching and education, or offered training as a consultant teacher with certification in mainstreamed environments.[104] Respondents to a 1993 survey of special education directors found a need for further training of their school district staff in several areas related to mainstreaming. The three high training needs were: (a) training regular classroom staff to collaborate with special educators adapting instruction, (b) training or orienting regular classroom staff to develop positive attitudes toward students with disabilities, and (c) training or orienting nondisabled students to develop positive attitudes about students with disabilities.[105]

There have been some proposals to change the training programs of regular and special education teachers in recognition of the growing partnership between the fields. One proposed option is the establishment of noncategorical preservice programs that merge professional training in regular and special education. With this option, the content of the training programs should emphasize theory, practice, and experience in team problem-solving and teaching. This strategy would enable general and special educators to participate together in experiences directly related to enhancement of their skills to collaborate and to instruct students with and without disabilities in the same setting.[106] At least one study suggests that this proposal is a viable option considering the similarities of competencies required by regular and special education teachers who instruct students with disabilities.[107]

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[100] OCR Complaint No. 04-86-1191, Nov. 17, 1986, 352 EHLR 338, 340.

[101] Ibid.

[102] *See* H. Rep. No. 476, 101st Cong., 2d sess. 35 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723, 1758 ("Regular educators are not routinely provided with the knowledge and skills necessary to successfully work with students with severe disabilities in the regular classrooms.").

[103] James M. Patton and Ronald Braithwaite, "Special Education Certification/Recertification for Regular Educators," *The Journal of Special Education*, vol. 24, no. 1 (1990), p. 121.

[104] Kearney and Durand, "How Prepared Are Our Teachers," p. 6.

[105] Joel R. Arick and David Krug, "Special Education Administrators in the United States: Perceptions on Policy and Personnel Issues," *The Journal of Special Education*, vol. 27, no. 3 (1993), pp. 362–63.

Regular Education Teacher Training: OCR's Enforcement Efforts

With Federal requirements emphasizing education of students with disabilities in the regular education environment,[108] there is a question of the extent to which regular education teachers must have training in the instruction of persons with a given student's particular disability. Many students with disabilities now receive full-time or part-time instruction in regular classes.[109] For example, during the 1993–1994 school year, 39.3 percent of students with a specific learning disability received instruction in the regular class; 41.4 percent of students with a specific learning disability received part-time instruction in a resource room and part-time instruction in the regular class; 8.6 percent of students with mental retardation received instruction in the regular class; 26.2 percent of students with mental retardation received part-time instruction in a resource room and part-time instruction in the regular class; 20.5 percent of students with serious emotional disturbance received instruction in the regular class; and 25.6 percent of students with serious emotional disturbance received part-time instruction in the resource room and part-time instruction in the regular class.

To accommodate these placements, school systems have adopted strategies, such as "team teaching," where regular education and special education teachers share responsibility for instructing students with disabilities.[110] For example, Elmhurst High School in Fort Wayne, Indiana, uses a cluster model to educate freshman students with learning disabilities, mild disabilities, and hearing impairments with nondisabled freshmen. Disabled and nondisabled students spend 1 hour in each of their cluster classes of math, science, and English every morning. Students with disabilities learn with their nondisabled peers through an adapted curriculum that addresses their special needs. A special education teacher works to modify the lessons and helps the regular education teacher with all students. In every class, the role of the special education teacher is different depending on the subject and the students' needs. The special education teacher may team teach with the regular education teacher, lead lessons, modify assignments, or work one-on-one with students.

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[106] Richard A. Villa, Jacqueline S. Thousand, Herman Meyers, and Ann Nevin, "Teacher and Administrator Perceptions of Heterogeneous Education," *Exceptional Children*, vol. 63, no. 1 (Fall 1996), p. 43.

[107] The study surveyed regular education teachers who instruct students with disabilities ("mainstream teachers") to identify their "core competencies" and examine the similarity to competencies for special education teachers. Based on the survey results, the study's authors identified certain implications: (1) Regular educators who work with students with disabilities share certain preservice training needs with special educators; consequently, not all coursework need be separate; and (2) Some of the inservice training needs of regular educators serving students with disabilities and special educators are probably the same. Mary F. Landers and Roberta Weaver, "Teaching Competencies Identified by Mainstream Teachers: Implications for Teacher Training" (paper presented at the 69th Annual Conference of the Council for Exceptional Children, Atlanta, GA, Apr. 1–5, 1991), p. 9, *reproduced by* EDRS, ED# 336 895.

[108] *See* 34 C.F.R. § 104.34(a) (1996); 34 C.F.R. § 300.550(b)(2) (1996).

[109] *See* table 3.6 in chap. 3.

[110] LRP Publications, *Inclusive Education Programs*, vol. 3, iss. 3 (March 1996), pp. 5–6. John Houser, a regular education English teacher in one of the Elmhurst High clusters, reported that working with the special educator in the classroom was relatively easy. By working with a special educator, Houser was able to modify tests and quizzes that he designed to make the directions clearer to students with disabilities and he was able to adapt lessons to their needs. Ibid.
Further, some educators emphasize that cooperation between regular and special education teachers is a key to success in including students with disabilities in the regular class. They note, "The [regular] classroom teacher should become very involved with the process of developing the IEP and with making sure that the necessary supports and services are provided to the included student." Ray Van Dyke, Martha Ann Stallings, and Kenna Colley, "How to Build an Inclusive School Community: A Success Story," *Phi Delta Kappan* (February 1995), p. 477.

The section 504 regulations, however, are unclear as to whether all teachers instructing students with disabilities must have some specialized training to teach persons with disabilities. OCR's investigative approach traditionally has focused on ensuring that special education teachers are trained and certified to instruct persons with the disability in question. According to OCR's Enforcement Director for the DC Metro office, "[t]o date, OCR has not had to address this issue of teacher certification in a 'team teaching' situation,"[111] and OCR has not provided policy guidance on this issue.[112] She noted that OCR "does not want to discourage innovative teaching techniques, but [it] will have to examine teacher certification issues, such as what will it mean . . . if schools teach students with learning disabilities in the same classroom with students labelled as mentally retarded."[113]

Despite the lack of OCR policy guidance on teacher training, some education organizations and educators have recognized the importance of offering training to regular education teachers to prepare them in instructing students with disabilities in the regular class.[114] For example, some school districts hire new teachers who have prior knowledge of working with diverse learners, or they obtain consultants to discuss classroom management techniques, such as behavior modification and cooperative learning, a strategy for teaching a diverse group of learners.[115] With the changing dynamics in classrooms and the promotion of more integrated environments for students with and without disabilities, it will be increasingly necessary for OCR to clarify section 504 compliance obligations on teacher training.

Evaluation and Allocation of Facilities and Other Resources

Background

A fundamental element to public elementary and secondary education is ensuring that students have necessary facilities and resources with which to learn. The problems with outdated or decaying school facilities can negatively affect students. According to a recent report issued by the U.S. General Accounting Office (GAO), decaying school facilities are found in every State and community in this country. The condition of decaying school facilities has been divided into three main categories:[116] (1) schools reporting at least one inadequate building; (2) schools reporting at least one inadequate building feature; and (3) schools reporting at least one unsatisfactory environmental condition. For these three categories the national averages were alarming. Nationwide one-third of the school systems reported at least one building in unsatisfactory condition. Sixty percent of schools reported needing to repair at least one major building feature. Finally, 58 percent of school systems reported at least one unsatisfactory environmental condition. These national percentages show that the Nation's schools are in desperate need of repair. The GAO report also showed decaying school facilities in all three categories defined by different characteristics.[117]

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[111] Jean Peelen, Enforcement Director, OCR, DC Metro Office, DOEd, interview in Washington, DC, May 28, 1996, p. 5 (hereafter cited as Peelen interview) (Ms. Peelen also is the former issue contact person for minorities in special education.).

[112] Ibid.

[113] Ibid.

[114] *See* NASBE, *Winning Ways*, p. 20 ("it is essential that teachers be involved in planning and preparing for inclusion from its very inception. In addition, teachers and administrators point out the need to ensure that training opportunities persist year to year, even after the initial move toward inclusion.").

[115] *See* ibid.

[116] The GAO report divided conditions of school facilities into these three categories because inadequacies differed among schools. Some schools reported whole buildings as inadequate, some reported inadequate building features, some reported inadequate environmental conditions, and some schools reported a combination of all three. An inadequate building was a structure that was not sound. Some examples of an inadequate building feature would be plumbing and sewage problems, roof repairs, and faulty doors and windows. Inadequate environmental features included a variety of problems including lighting, air quality, water supply, and acoustics for noise control. These are just some examples of responses that were given in the survey. These three categories help to decipher exactly the number of inadequacies found in schools. *See* U.S. General Accounting Office, *America's Schools Report Differing Conditions* (Washington, DC: U.S. Government Printing Office, 1996)

The problems with inadequate school facilities have been particularly severe in the case of students with disabilities. As with the history of problems in other aspects of public elementary and secondary education, students with disabilities have confronted denials and discrimination in receiving adequate and appropriate facilities and equipment to meet their educational needs.[118] There have been problems with schools serving students with disabilities in segregated, substandard facilities inferior to those provided to students without disabilities[119] and with schools failing to provide resources necessary to meet the educational needs of disabled students.

These problems can greatly impede the educational success and well-being of students with disabilities. There have been concerns that placement into inferior facilities or those not comparable to facilities provided to students without disabilities leads to stigmatization of students with disabilities.[120] Reports of "inclusion successes" generally occur when there are sufficient resources and staff trained to accompany the placement of students with disabilities in regular classes.[121] Without commitment to supplying ad-

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(hereafter cited as GAO, *America's Schools*).

[117] These characteristics help to show where decaying school facilities are most prevalent. The following subgroups: geographic region, community type, minority enrollment, and the number of children eligible for a free or reduced-price lunch were chosen for this discussion. Geographic regions are divided into four groups: Northeast, Midwest, South, and West. Community types are central city, urban fringe, and rural. Minority enrollment is divided into groups by percentages: less than 5 percent, 5 to less than 20 percent, 20 to less than 50 percent, and 50 percent or more. The poor children group first determines the number of children who are eligible for a free or reduced-price lunch within the schools enrollment. After that determination is made the groups are divided by percentages: less than 20 percent, 20 to less than 40 percent, 40 to less than 70 percent, and 70 or more. These subgroup examinations give insight to the number of schools in each of the main categories that may be at a greater risk. Ibid.

[118] There is concern about whether the conditions of school facilities are adequate for providing proper education for children regardless of whether or not they are disabled. Studies by the General Accounting Office provide evidence that every State has deteriorating school buildings and facilities such as leaking roofs, inadequate lighting, poor ventilation, and unhealthy air quality. In each region of the country and in urban, suburban, and rural areas approximately one-third of all school systems report inadequate buildings; more than 50 percent report inadequate building features; and in some regions, almost 70 percent of school systems report inadequate environmental conditions. Ibid.

[119] *See* Jesse L. High, Regional Civil Rights Director, OCR, Region IV, DOEd, letter to William Gardner, Superintendent, Dougherty County School District, Albany, GA, re: Complaint No. 04-90-1088, May 2, 1990, 16 EHLR 1190, 1192 (Speech therapy class was located in a book storage room with no heating or air conditioning unit, resulting in a space that was intemperate and generally uncomfortable. In addition, it was reported that the teacher was sometimes forced to use a flashlight to compensate for poor lighting.); OCR, Region III, DOEd, letter to Sidney Faucette, Superintendent, Stafford County Public Schools, Stafford, VA, re: Complaint No. 03-89-1118, Mar. 12, 1990, 16 EHLR 896, 898-99 (LD classes located in three-walled lofts above the school offices because there was a shortage of space in the school and the LD classes were smaller than the regular classes.).

[120] *See* Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Robert D. Aaron, Superintendent, Terrell County School District, Dawson, GA, re: Complaint No. 04-92-1592, May 11, 1993, 20 IDELR 377, 380 ("OCR interviewed all special education teachers regarding this allegation. They stated that prior to the district's placing two [high school] regular education classes in the mobile units, their students were stigmatized by being the only ones having to attend classes in the mobile units, and, as a result, the students were more frequently tardy and absent from classes.").

equate facilities and resources, schools cannot offer students with disabilities full opportunities for success in school.

In response to complaints by students with disabilities, their parents, and disability advocates for adequate and appropriate facilities and resources for educating students with disabilities, the Federal Government has taken several approaches over the years to improve the provision of adequate facilities and resources for students with disabilities in public elementary and secondary education. Since the 1960s, Federal programs have provided financial assistance to fund and improve educational resources and facilities for students with disabilities. The IDEA Part B Program has financed the provision of teachers, support staff, resources, and facilities used to educate students with disabilities. Another IDEA grant program has provided funds to advance the use of new technology, media, and materials in the education of students with disabilities and the provision of related services.[122]

In addition to Federal funding, the Federal Government has taken other approaches to support adequate facilities and resources for students with disabilities. For example, conditions to the IDEA Part B have required States to assure that they establish a goal of providing full educational opportunity to all children with disabilities to qualify for financial assistance.[123] They have required States to assure that there is a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal.[124] They also have required that public school systems provide services to children with disabilities that are comparable to those provided other children in the school system.[125] Similarly, section 504 regulations have required recipients that operate facilities identified as being for persons with disabilities to ensure that the facilities and the services and activities provided in them are comparable to other facilities, services, and activities of the recipients.[126] In addition, the IDEA and the section 504 regulations have required that students with disabilities receive an appropriate education, designed to meet their needs,[127] and this requirement contemplates the provision of adequate facilities, equipment, and other related aids and services that will make the education appropriate for the student and tailored to his or her needs.

Resources Including Instructional Approaches

A resource room is a separate learning facility, area, or room that provides specific and available instruction and services designed for students with disabilities according to the students' needs. It is one service option in a continuum of options, including full-time instruction in a separate class or a separate facility and also the provision of related services and instructional content. Usually, the students attend a regular classroom for subjects that do not require special or separate services. Students may receive instruction from a resource teacher as well as instruction from the regular classroom teacher.[128] For resource rooms to be effective, they need to provide services tar-

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[121] *See* "Inclusion: Good For Students, or Simply P.C.," *Daily Report Card*, Sept. 12, 1994 ("inclusion remains successful in classrooms 'where plenty of extra resources and patience are available'. . . Resources include classroom aides, interpreters, curriculum modifications, adapted equipment, computers and software, peer tutoring, after-school or 'pull-out' special services, and frequent meetings of the child's individualized plan team") (citing Webb, *The Harvard Education Letter*, July/August 1994).

[122] Pub. L. No. 105–17, § 687(b) (1997).

[123] *Id.* § 612(a)(2) (1997).

[124] *Id.*

[125] 34 C.F.R. § 300.231(b) (1996).

[126] *Id.* § 104.34(c) (1996).

[127] *See* Pub. L. No. 105–17, § 612(a)(1)(A) (1997); 34 C.F.R. § 300.121 (1996); 34 C.F.R. § 104.33(b) (1996).

geted to students' needs. Researchers have found three major problems in the use of resource rooms: there has been a lack of coordination between (1) the student's time spent in a resource room and the student's needs; (2) the instructional methods and services, and the student's needs; and (3) the resource room teacher and the regular classroom teacher.[129] Thus, students' time in the resource room did not necessarily promote academic success.[130]

Research on whether part-time placement in resource rooms is more effective than full-time placement in regular classes in educating students with disabilities has mixed findings but generally suggests that resource rooms have positive effects.[131] Two studies conducted in the 1990s examined resource room instruction and other programs offered to children with disabilities. In 1991, one researcher studied the process of teaching reading to children with learning disabilities in a Southwestern school district.[132] The resource room focused on reading. The researcher found that resource teachers who had longer interactions with students and initiated interactions with students had more success in enhancing the reading levels of the students than regular classroom teachers. The resource room was more work-oriented, offered students more personal contact with the teachers, and offered other special services, such as speech therapy, to help enhance the reading levels of the students.[133] Those types of efforts and resources are rarely provided in a regular classroom.[134] A 1993 study surveyed special education teachers, regular education teachers, and parents of special education students in an Ohio school district concerning their views about special education service delivery.[135] Generally, those surveyed reported that the students needed more aides, computers, special education classrooms, and tutoring.[136] The study concluded that special and regular educators needed training in "collaboration techniques and in developing interventions."[137]

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[128] David Berliner and Ursula Casanova, "What Kind of Resource Is Your Resource Room?" *Instructor* (April 1997), p. 14. *See also* Lloyd R. Kinnison, "Characteristics of Mildly Handicapped Students Served in Resource Rooms," paper presented at the Annual Convention of the Council for Exceptional Students (Washington, DC, Mar. 28–Apr. 1, 1988) (ERIC Document ED296555), p. 4 (hereafter cited as Kinnison, "Characteristics of Mildly Handicapped Students").

[129] *See* Berliner and Casanova, "What Kind of Resource Is Your Resource Room?" p. 14.

[130] Reading was the focus of activity in the resource room. The researchers found that on average, more than half of the student's time was spent on organizational tasks, waiting, being out of the room, or working on assignments not related to reading. The methods of instruction were not very different from those in the regular classroom, and although student-teacher ratios were about six-to-one (in the resource room), the students seldom received direct reading instruction or feedback. The lack of communication between the regular and the resource room teachers showed in the assessment of the reading instruction. Although the perception on the part of the teachers was that reading instruction was primarily offered in the resource room, essentially, students received more reading instruction in the regular classroom. *See* Berliner and Casanova, "What Kind of Resource Is Your Room?" pp. 14–15.

[131] James O. Affleck, Sally Madge, Abby Adams, and Sheila Lowenbraun, "Integrated Classroom Versus Resource Model: Academic Viability and Effectiveness," *Exceptional Children*, vol. 54, no. 4 (January 1988), p. 339 (hereafter cited as Affleck et al., "Integrated Classroom Versus Resource Model").

[132] Elizabeth A. Hall, "An Examination of the Process of Teaching Reading to Learning Disabled Children: Vygotskian Perspectives," paper presented at the Annual Meeting of the American Educational Research Association (Chicago, IL, Apr. 3–7, 1991), p. 1 (ERIC Document 336 894).

[133] Ibid., p. 14.

[134] *See* Mehan (1982) and Tharp and Gallimore (1988), as cited in Hall, "An Examination of the Process of Teaching Reading," pp. 12–13.

[135] Victoria L. Bostelman, *Special Education Students in the Regular Education Classroom: One Rural School District's Attitudes* (1993), p. 1 (ERIC Document 359 728).

[136] Ibid., pp. 22, 35.

Provision of Appropriate and Comparable Facilities, Activities, and Services: OCR's Enforcement Efforts

OCR's focus on the provision of facilities and resources for students with disabilities largely has stemmed from two provisions of the section 504 regulations: (1) the requirement that schools provide students with disabilities regular or special education and related aids and services designed to meet the individual needs of students with disabilities as adequately as students without disabilities,[138] and (2) the requirement that facilities, activities, and services identified as being for persons with disabilities be comparable to the recipient school system's other facilities, activities, and resources.[139] Both provisions address a certain quality level that must be met when providing an education to students with disabilities.

The first provision requires that students with disabilities receive an appropriate education, designed to meet their needs.[140] This requirement contemplates providing a student with disability adequate facilities, equipment, and other related aids and services that will make the education appropriate for the student and tailored to his or her needs. The appendix to the section 504 regulations clarifies that "[t]o be an appropriate education, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met." This means that "the quality of the educational services provided to handicapped students with disabilities must be equal to that of the services provided to nonhandicapped students; thus . . . appropriate materials and equipment must be available" to students with disabilities.[141] A recipient school district failing to meet this standard would not be providing a student having a disability with a free appropriate public education as defined in the section 504 regulations.[142]

OCR has not established a standard for determining whether the materials and equipment provided to each student with a disability are appropriate. The difficulty in creating such a standard is that it encroaches on the autonomy of educators to decide what methods and resources are appropriate in educating students with disabilities. Based on OCR's overall policy approach to refrain, except in extraordinary circumstances, from reviewing the results of individual placement and other educational decisions, OCR leaves the decision on appropriateness of materials and equipment to the discretion of educators unless the facts indicate that the decision is not consistent with section 504.[143] For example, if the educational facilities and resources provided to a student with a disability were based on factors such as administrative convenience or category of disability, instead of the actual needs of a student, the program would deny that student a free appropriate public education.[144]

The second provision on facilities and resources requires a recipient school district that operates facilities identified for use by students with disabilities to ensure that such facilities and the services and activities provided in them are comparable to other facilities, services, and activities of the recipient.[145] Examples of facilities identified for use by students with disabilities would include resource rooms and separate class-

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137 Ibid., p. 35.

[138] 34 C.F.R. § 104.33(b) (1996).

[139] *Id.* § 104.34(c).

[140] *See* Pub. L. No. 105–17, § 612(a)(1)(A) (1997); 34 C.F.R. § 300.121 (1996); 34 C.F.R. § 104.33(b) (1996).

[141] *See* 34 C.F.R. pt. 104, app. A, no. 23 (1996).

[142] *See id. § 104.33(a)–(b) (1996).*

[143] *See id. pt. 104, app. A, subpt. D, preamble (1996).*

[144] *See* OCR, "Minority Students and Special Education" Policy, p. 12.

rooms or schools for students with disabilities. One commentator has interpreted this comparability requirement to mean that the facilities and classrooms provided to students with disabilities must be in as good a condition as those provided to students without disabilities.[146] This requirement focuses on a standard of quality. The facilities for students with disabilities and the services and activities provided in them must be comparable in quality to a recipient school system's other facilities, services, and activities.[147] There has been at least one legal challenge to the validity of this requirement,[148] and the court in that case found the requirement a valid interpretation of section 504.[149]

In comparing these two provisions, the first focuses on determining whether the facilities and resources provided to the student were appropriate to the student's educational needs. It applies to any facilities and resources provided to the student regardless whether they are identified for use by students with disabilities. Therefore, the provision would apply to equipment and materials provided to students with disabilities in regular classes and schools. Although the appendix to the regulations describes the provision as a comparative quality standard ("the quality of the educational services provided to handicapped students with disabilities must be equal to that of the services provided to nonhandicapped students"), it appears that the actual standard of compliance hinges on what was appropriate for the student's individual educational needs. The second provision is limited to those facilities, and the services and activities therein, that are identified for use by students with disabilities. In addition, it actually addresses a comparative quality standard. The focus of this provision, therefore, is ensuring that resource rooms, separate special education classrooms, and separate schools for persons with disabilities are comparable in quality to facilities, services, and activities provided for regular education.

In investigating a complaint about the comparability of facilities and resources, OCR investigators examine the information provided by the school district, and they determine whether it is accurate based on a review of the facilities, services, or activities actually provided. When the fitness of a facility is at issue, OCR investigators make onsite visits to examine the facility to ensure that it is comparable.[150] OCR has focused on a number of factors including differences in the size, type, and quality of the facilities and equipment provided to students with and without disabilities. In several cases, OCR has examined the size or type of a facility provided to students with disabilities by comparing it to State standards on class sizes and to the size and type of classrooms offered to nondisabled students.[151] OCR, how-

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[145] 34 C.F.R. § 104.34(c) (1996).

[146] Mark C. Weber, *Special Education Law and Litigation Treatise* (Horsham, PA: LRP Publications, 1992), p. 23:11.

[147] *See* 34 C.F.R. pt. 104, app. A, subpt. D, no. 24 (1996).

[148] Students of Calif. Sch. for the Blind v. Honig, 736 F.2d 538 (9th Cir. 1984), 1984–85 EHLR DEC. 556:110.

[149] In Students of California School for the Blind v. Honig, 736 F.2d 538 (9th Cir. 1984), 1984–85 EHLR DEC. 556:110, the defendants in the case contended that 45 C.F.R. § 84.34(c), now 34 C.F.R. § 104.34(c) and the provision requiring comparable facilities, was invalid because OCR exceeded its authority granted in section 504 when interpreting that law and creating the regulation provision. The court found the provision a valid interpretation of section 504, noting that "[b]ecause § 504 forbids discrimination in federally funded programs, a regulation requiring comparable facilities seems to be a logical and valid interpretation of that statute." 736 F.2d at 546 and 1984–85 EHLR DEC. 556:114–15.

[150] Linda Colón, Team Leader, OCR, Region II, DOEd, telephone interview, June 26–27, 1996, pp. 3–4 (hereafter cited as Colón interview).

[151] *See* Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Robert D. Aaron, Superintendent, Terell County School District, Dawson, GA, re: Complaint No. 04–92–1592, May 11, 1993, 20 IDELR 377, 379; Kenneth A. Mines, Regional Director, OCR, Region V, DOEd, letter to Terry Wiseman, Superintendent, Stockbridge School District, Stockbridge, WI, re: Complaint No. 05–92–1151, Nov. 30, 1992, 19 IDELR 549, 550; Linda McGovern, Acting Regional

ever, has not found differences in sizes and/or types of facilities or noncompliance with State guidelines as *per se* violations of the section 504 regulations.[152]

OCR has considered additional factors for determining the comparability of facilities and resources and compliance with section 504, such as differences in the quality of the facilities and equipment and the appropriateness of the existing facilities for the students with disabilities. It has considered differences in the supplies provided in the classroom; the heating, air conditioning, and lighting; and the distraction created by noise during instructional class time.[153] For example in one case, OCR found that the mobile units occupied primarily by students with disabilities had heat and air conditioning like the main school building, but unlike the main buildings, they lacked drinking fountains, restrooms, covered walkways, adequate drainage, secured locks, adequate classroom equipment, or adequate storage space.[154]

In many cases, OCR's analysis has compared the size and quality differences to determine whether the differences were of a nature to disadvantage students with disabilities in relation to

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Director, OCR, Cleveland Office, DOEd, letter to James R. Gland, Superintendent, East Allen County Schools, New Haven, IN, re: Complaint No. 15–92–1091, July 16, 1992, 19 IDELR 80; Jesse L. High, Regional Civil Rights Director, OCR, Region IV, DOEd, letter to William Gardner, Superintendent, Dougherty County School District, Albany, GA, re: Complaint No. 04–90–1088, May 2, 1990, 16 EHLR 1190, 1192; OCR, Region III, DOEd, letter to Sidney Faucette, Superintendent, Stafford County Public Schools, Stafford, VA, re: Complaint No. 03–89–1118, Mar. 12, 1990, 16 EHLR 896; William H. Thomas, Regional Director, OCR, Region IV, DOEd, letter to William Reeves, Superintendent, Winston County School District, Double Springs, AL, re: Complaint No. 04–85–1226, Oct. 17, 1985, 352 EHLR 66, 69 (The dimensions of all classrooms, regular and special, had less space than prescribed by the ***State Handbook on Planning Facilities Bulletin No. 30***; however, the classrooms for students with learning disabilities and mental retardation were far below the square feet per student ratio compared to the regular classrooms.); Dewey E. Dodds, Director, OCR, Region III, DOEd, letter to Superintendent, Fredericksburg City Public Schools, Fredericksburg, VA, re: Complaint No. 03–80–1152, Jan. 22, 1981, 257 EHLR 205, 207 (The classrooms provided to nondisabled students were over five times the size of the classroom designated for students with learning disabilities, and the LD classroom was far smaller than the minimum classroom size prescribed by the Virginia State Guidelines for primary grades.).

[152] *See* Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to Sidney Faucette, Superintendent, Stafford County Public Schools, Stafford, VA, re: Complaint No. 03–87–1054, July 1, 1987, 352 EHLR 449, 450 ("The regulations implementing section 504 do not require that classroom size for handicapped students be exactly the same as for nonhandicapped students.").

[153] *See* Kenneth A. Mines, Regional Director, OCR, Region V, DOEd, letter to Terry Wiseman, Superintendent, Stockbridge School District, Stockbridge, WI, re: Complaint No. 05–92–1151, Nov. 30, 1992, 19 IDELR 549, 550; Kenneth A. Mines, Acting Regional Director, OCR, Region VII, DOEd, letter to A.L. Adair, Superintendent, Red Oak Community School District, Red Oak, IA, re: Complaint No. 07–91–1059, Aug. 21, 1991, 18 IDELR 224, 225; Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to Michael Ferguson, Superintendent, Wayne County School District, Wayne, WV, re: Complaint No. 03–90–1049, May 4, 1990, 16 EHLR 1261; Jesse L. High, Regional Civil Rights Director, OCR, Region IV, DOEd, letter to William Gardner, Superintendent, Dougherty County School District, Albany, GA, re: Complaint No. 04–90–1088, May 2, 1990, 16 EHLR 1190, 1192; OCR, Region III, DOEd, letter to Sidney Faucette, Superintendent, Stafford County Public Schools, Stafford, VA, re: Complaint No. 03–89–1118, Mar. 12, 1990, 16 EHLR 896, 898–99; OCR, Cleveland Office, DOEd, letter to Foster B. Gibbs, Superintendent, Saginaw, MI, re: Complaint No. 15-89-1101, Jan. 5, 1990, 16 EHLR 801, 804; Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to Sidney Faucette, Superintendent, Stafford County Public Schools, Stafford, VA, re: Complaint No. 03–87–1054, July 1, 1987, 352 EHLR 449, 450; Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to Jack C. Dulaney, Superintendent, Monongalia County Schools, Morgantown, WV, re: Complaint No. 03–85–1041, Apr. 13, 1987, 352 EHLR 415, 427-28; William H. Thomas, Regional Director, OCR, Region IV, DOEd, letter to G.W. King, Superintendent, Chattooga County School District, Summerville, GA, re: Complaint No. 04–34–1139, Sept. 7, 1984, 257 EHLR 561, 563.

[154] Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Robert D. Aaron, Superintendent, Terell County School District, Dawson, GA, re: Complaint No. 04–92–1592, May 11, 1993, 20 IDELR 377, 379.

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students without disabilities or deny them opportunities available to nondisabled students.[155] For example, OCR has found noncomparable facilities in instances where the facilities for students with disabilities lacked certain equipment, thus, limiting the ability of students with disabilities to use resources or participate in activities available to nondisabled students.[156] In some of these cases, school districts had attempted to provide students with disabilities the same opportunities as nondisabled students by permitting students with disabilities access to equipment and services at regular schools for part of the school day.[157] In one case, OCR found that the Holland Education Center (HEC) consisted of three portable trailers that formed three interconnected classrooms, serving only students with disabilities. HEC lacked a cafeteria, gymnasium, library or swimming pool, unlike the school district's other school buildings. Although the district permitted HEC students to use a neighborhood gymnasium once every 2 weeks and a swimming pool at another school building and the city library twice each semester, OCR found that HEC was not comparable to the facilities provided to nondisabled students.[158]

OCR's approach to such situations has varied. In some cases, OCR has taken a stricter approach in comparing the facilities provided to students with and without disabilities. In these cases, OCR has determined comparability by examining the equipment and resources actually found within each of the facilities, and they have not based their findings on whether a school district could provide access to the same equipment and resources by part-time placements and transportation elsewhere.[159] For example, OCR's regional office in Philadelphia, Pennsylvania, found that students with disabilities attending the Center for Exceptional Children received art, music, part of their physical education program, and their lunch at a location away from the center with nondisabled students because the center did not have equipment and resources necessary to provide these services. The regional office found the school district in violation of 34 C.F.R. section 104.34(c) because the center lacked the resources, services, and activities available at regular schools; in addition, unlike the other district schools, the center lacked office staff such that teaching staff had to answer phones during class time, and the center lacked walled classrooms.[160]

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[155] *See* Archie B. Meyer, Sr., Acting Regional Director, OCR, Region IV, Office for Civil Rights, Region III, DOEd, letter to R. Mike Simmons, Superintendent, Johnson City School District, Johnson City, TN, re: Complaint No. 04–91–1247, Aug. 8, 1991, 18 IDELR 222, 222–23; OCR, Cleveland Office, DOEd, letter to Foster B. Gibbs, Superintendent, Saginaw, MI, re: Complaint No. 15–89–1101, Jan. 5, 1990, 16 EHLR 801, 804; William H. Thomas, Regional Director, OCR, Region IV, DOEd, letter to G.W. King, Superintendent, Chattooga County School District, Summerville, GA, re: Complaint No. 04–34–1139, Sept. 7, 1984, 257 EHLR 561, 563.

[156] *See* Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to Jack C. Dulaney, Superintendent, Monongalia County Schools, Morgantown, WV, re: Complaint No. 03–85–1041, Apr. 13, 1987, 352 EHLR 415, 427 ("Because [profoundly mentally impaired] students are placed in a facility which offers an academic program appropriate only to PMI students, they are precluded from the opportunity to use some of the education resources represented by the broad range of regular high school academics."); Dewey E. Dodds, Director, OCR, Region III, DOEd, letter to Jerry D. Stout, Executive Director, Carbon-Lehigh Intermediate Unit #21, Schnecksville, PA, re: Complaint No. 03–84–1076, Sept. 11, 1984, 257 EHLR 551, 553 (Because of the lack of equipment and services at the Bevan School, "Bevan students must travel to a nearby school for physical education classes and do not participate in activities which require the other specialized facilities [available at the school district's other schools].").

[157] *See* Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to Robert Ingram, Superintendent, Jefferson County Schools, Charles Town, WV, re: Complaint No. 03–89–1071, Sept. 29, 1989, 16 EHLR 255 (Students with disabilities attending the school district's Center for Exceptional Children traveled to regular schools in order to receive their art, music, and physical education classes. In addition, because the center did not have cafeteria facilities or a library, the center's students used a cafeteria and the public library located several blocks from the center.); Dewey E. Dodds, Director, OCR, Region III, DOEd, letter to Jerry D. Stout, Executive Director, Carbon-Lehigh Intermediate Unit #21, Schnecksville, PA, re: Complaint No. 03–84–1076, Sept. 11, 1984, 257 EHLR 551, 553 (Because the Bevan School for students with disabilities did not have a gymnasium, Bevan students traveled to a nearby school for physical education classes.).

[158] OCR, Cleveland Office, DOEd, letter to Foster B. Gibbs, Superintendent, Saginaw, MI, re: Complaint No. 15–89–1101, Jan. 5, 1990, 16 EHLR 801, 804.

[159] *See, e.g.*, OCR, Cleveland Office, DOEd, letter to Foster B. Gibbs, Superintendent, Saginaw, MI, re: Complaint No. 15–89–1101, Jan. 5, 1990, 16 EHLR 801, 804; Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to Robert Ingram, Superintendent, Jefferson County Schools, Charles Town, WV, re: Complaint No. 03–89–1071, Sept. 29, 1989, 16 EHLR 255, 256–57; Dewey E. Dodds, Director, OCR, Region III, DOEd, letter to Jerry D. Stout, Executive Director, Carbon-Lehigh Intermediate Unit #21, Schnecksville, PA, re: Complaint No. 03–84–1076, Sept. 11, 1984, 257 EHLR 551, 553 (Because the Bevan School for students with disabilities did not have a gymnasium, Bevan students traveled to a nearby school for physical education classes.).

In other cases, OCR has taken a broader approach and focused more on the opportunities, equipment, and services provided to the students with disabilities, with less emphasis on the location at which they were provided. For instance, OCR's regional office in New York City investigated a case in which the complainant alleged that Bayard School, a facility for students with disabilities, was not comparable because it had no cafeteria, library, or auditorium unlike other schools in the district. OCR found that (1) Bayard had no cafeteria and that students picked up their lunches which were prepared at another facility and ate their lunches in their classrooms; (2) like two other schools in the district, Bayard used the gymnasium as an auditorium; and (3) although Bayard had no library, its students regularly used the public library which was only two blocks away and which had more resources than any of the district's schools. The complainant also alleged that the programs offered at Bayard were not comparable to those offered at other district schools because Bayard did not offer industrial arts, home economics, vocational education, and consumer education. OCR found that the students at Bayard had the opportunity to take such classes at the other district schools and that the school district provided transportation for these students to take the courses. Based on these findings, OCR determined that there was insufficient evidence to support a violation of section 504 and the ADA on the issue of comparable facilities and programs within the facilities.[161]

In some cases, particularly those in which it was less clear that differences affected students with disabilities negatively, it was evident from the case letters that OCR had inquired whether school districts had an educational basis for the differences.[162] For example, in at least one case OCR found that students with learning disabilities occupied smaller, enclosed classrooms, and it considered the placement of the students with learning disabilities in these facilities as "justified by attempts to provide the students with an educational environment superior to that provided to non[disabled] students."[163]

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[160] Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to Robert Ingram, Superintendent, Jefferson County Schools, Charles Town, WV, re: Complaint No. 03–89–1071, Sept. 29, 1989, 16 EHLR 255, 256–57.

[161] *See* Sharyn Martin, Compliance Team Leader, OCR, Region II, DOEd, letter to Ronald F. Larkin, Superintendent, New Brunswick School District, New Brunswick, NJ, re: Complaint No. 02–95–1018, Jan. 26, 1996, 24 IDELR 578, 579–80.

[162] *See* William H. Thomas, Regional Director, OCR, Region IV, DOEd, letter to William Reeves, Superintendent, Winston County School District, Double Springs, AL, re: Complaint No. 04–85–1226, Oct. 17, 1985, 352 EHLR 66, 69 ("The elementary school EMR/LD classroom was similar to the regular elementary school classrooms except that all the regular classrooms had windows and the EMR/LD classroom had none. The District has no educational basis for placing EMR/LD students in the classrooms without windows.") ("Data show that no students in the regular classes district-wide were subjected to classrooms with no outside ventilation or to the overcrowded conditions compared to those provided to the EMR and LD students. . . The District had no educational basis for placing the EMR and LD students in these settings.").

[163] Linda McGovern, Acting Regional Director, OCR, Cleveland Office, DOEd, letter to James R. Gland, Superintendent, East Allen County Schools, New Haven, IN, re: Complaint No. 15–92–1091, July 16, 1992, 19 IDELR 80, 80–82. In this case, all but three of the regular education classrooms were open classrooms without inside walls. The school had moved students with learning disabilities four times during the school year. OCR determined that the first and fourth classrooms into which the students were moved were open rooms identical to the classrooms provided to nonhandicapped students and that, although the second and third rooms provided less space to the students with learning disabilities than State guidelines

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When classes for students with disabilities have had to share rooms or space with other classes, OCR has made varying findings based on the facts of a particular case, the degree to which the sharing of space negatively affected the education of the students with disabilities, and the educational basis for sharing space or for not using partitions. In one case, OCR found that a class for students with disabilities and one for students without disabilities shared space within a portable trailer; however, onsite observation revealed that the trailer was in good condition and that the classes operated physically and instructionally as a single class. OCR found that the teachers of the classes preferred this arrangement because of the special characteristics of their students and because they felt the use of partitions were distracting for the students. Because OCR found no distractions to the students by the use of the shared facilities and an educational basis for not using partitions, OCR determined that the facilities were comparable to those provided to nondisabled students.[164] In another case where the classes for students with disabilities shared space with resource classes, OCR's determinations varied. At two schools, OCR found that the facilities were not comparable to those provided to nondisabled students because the classes were physically and instructionally two separate classes. Further, despite the use of partitions, the teachers reported that their students were distracted due to noise from the other class or that they had to change their teaching style because of the classroom arrangement and that the students could not benefit from the environment to the same degree as in an unshared class. At another school with a shared classroom, OCR found no section 504 violation because the room was in good condition and there was evidence showing that the students worked in the setting without difficulty or distraction.[165]

Although OCR's routine practice has been to compare the facilities and resources provided to students with disabilities with those provided to nondisabled students, OCR has issued no formal policy outlining the number or kind of "other facilities" which OCR investigators should examine. The section 504 regulations do not clarify whether OCR investigators should compare the "identified facilities" to *all* other facilities operated by the school district recipient, a sample of the best facilities in the school district, or a sample that considers the best and worst facilities in the district. The condition of facilities can vary considerably in some school districts. Therefore, when determining whether a school district has provided comparable facilities to students with disabilities, it is useful for investigators to know whether to consider the best facilities and resources that the district has provided its students, some average accounting for the best and worst facilities in the district, or some other standard.

OCR's approach to investigations on this issue has varied in different cases. In cases where a space or room within a school was identified for use by students with disabilities, OCR has compared the space or room to other classrooms within the school.[166] In cases where trailers were identified for use by students with disabilities, OCR has compared the classroom size and conditions of the trailers in or around the regular school building to trailers used for nondisabled

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recommended, the rooms were enclosed which minimized noised from other classes. Ibid. at 82.

[164] Jesse L. High, Regional Civil Rights Director, OCR, Region IV, DOEd, letter to William Gardner, Superintendent, Dougherty County School District, Albany, GA, re: Complaint No. 04-90-1088, May 2, 1990, 16 EHLR 1190, 1191–92.

[165] Jesse L. High, Regional Civil Rights Director, OCR, Region IV, DOEd, letter to William Gardner, Superintendent, Dougherty County School District, Albany, GA, re: Complaint No. 04-90-1088, May 2, 1990, 16 EHLR 1190, 1192–94.

[166] *See* OCR, Region III, DOEd, letter to Sidney Faucette, Superintendent, Stafford County Public Schools, Stafford, VA, re: Complaint No. 03-89-1118, Mar. 12, 1990, 16 EHLR 896, 898–99 (LD classes located in three-walled lofts above the school offices were not comparable to the regular classrooms); Dewey E. Dodds, Director, OCR, Region III, DOEd, letter to Superintendent, Fredericksburg City Public Schools, Fredericksburg, VA, re: Complaint No. 03-80-1152, Jan. 22, 1981, 257 EHLR 205.

students and/or to the classrooms and conditions of the main building.[167] In one case OCR compared the "identified" school which students with disabilities were attending to the schools that those students would have attended if they had not had disabilities.[168] In other cases, OCR compared the "identified" facility to a sample of schools selected throughout the district, although it was unclear how the sample of schools was selected.[169]

In terms of remedies, school districts have taken a number of measures to comply with the section 504 regulations on comparable facilities and resources. In many cases, school districts resolved violations or findings of noncompliance by abandoning use of noncomparable facilities to educate students with disabilities and transferring the students to facilities used by students without disabilities.[170] In some cases, school districts have resolved findings of noncomparable facilities by making improvements to the facilities identified for use by students with disabilities or by scheduling students with and without disabilities in those facilities.[171]

Technology in the Classroom

Technology is playing a bigger role than ever before in the Nation's classrooms. Technology in education can enhance students' learning by promoting "positive shifts in students' thinking—from erring to revising, from memorizing to manipulating information, from struggling alone, to working collaboratively."[172] For students with disabilities, the effective use of technology in instruction is important.

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[167] *See* Kenneth A. Mines, Acting Regional Director, OCR, Region VII, DOEd, letter to A.L. Adair, Superintendent, Red Oak Community School District, Red Oak, IA, re: Complaint No. 07–91–1059, Aug. 21, 1991, 18 IDELR 224; William H. Thomas, Regional Director, OCR, Region IV, DOEd, letter to G.W. King, Superintendent, Chattooga County School District, Summerville, GA, re: Complaint No. 04–34–1139, Sept. 7, 1984, 257 EHLR 561.

[168] Dewey E. Dodds, Director, OCR, Region III, DOEd, letter to Jerry D. Stout, Executive Director, Carbon-Lehigh Intermediate Unit #21, Schnecksville, PA, re: Complaint No. 03–84–1076, Sept. 11, 1984, 257 EHLR 551. OCR determined that the school in which the students with disabilities had been placed lacked several resources available in other area schools to which the students would have been assigned were it not for their disabilities. The resources that were lacking included a library, specially equipped science laboratories, industrial arts shops, home economics rooms, an auditorium, a gymnasium, or a multipurpose room for these activities. As a result, the students with disabilities attending the school had to travel to a nearby school for physical education classes, and they were not participating in activities requiring the other specialized facilities. 257 EHLR at 551–53. *See also* Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to Jack C. Dulaney, Superintendent, Monongalia County Schools, Morgantown, WV, re: Complaint No. 03-85-1041, Apr. 13, 1987, 352 EHLR 415, 427-28 (OCR compared the trailer to which high school age students with disabilities had been assigned to each of the three regular education high schools in the district.).

[169] *See* William H. Thomas, Regional Director, OCR, Region IV, DOEd, letter to William Reeves, Superintendent, Winston County School District, Double Springs, AL, re: Complaint No. 04–85–1226, Oct. 17, 1985, 352 EHLR 66, 69 (OCR observed all special education classrooms and the majority of the regular classrooms in the school districts. It was not clear how the majority of regular classrooms was selected); OCR, OCR, Region VI, DOEd, letter to Thomas J. Smith, Superintendent, Oklahoma City Public Schools, Oklahoma City, OK, re: Compliance Review of Oklahoma City Public Schools, Oct. 18, 1978, 311 EHLR 04, 04–05 (OCR examined the Carver Center, a facility for students with various disabilities including physical and emotional disabilities. The facility was located in a low socioeconomic area of the school district and was in poor condition. It had several portable buildings, lacked an appropriate gymnasium, had a very small cafeteria, and an extremely small principal's office used for student detention and some individual instruction. It was unclear whether OCR compared the center to other facilities in the district's low socioeconomic area or in all areas of the district.).

[170] *See* Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to Jack C. Dulaney, Superintendent, Monongalia County Schools, Morgantown, WV, re: Complaint No. 03–85–1041, Apr. 13, 1987, 352 EHLR 415, 418; OCR, Region IV, DOEd, letter to Wayne Teague, Superintendent of Education, Alabama State Department of Education, Montgomery, AL, re: Complaint No. 04–85–1082, Aug. 5, 1985, 352 EHLR 41, 43–44 (To resolve violations of the "comparable facilities" requirement, the SEA ensured that the LEAs would relocate special education classes currently meeting in basements, storage areas or other substandard conditions to adequate classrooms.); Dewey E. Dodds, Director, OCR, Region III, DOEd, letter to Jerry D. Stout, Executive Director, Carbon-Lehigh Intermediate Unit #21, Schnecksville, PA, re: Complaint No. 03–84–1076, Sept. 11, 1984, 257 EHLR 551; Dewey E. Dodds, Director, OCR, Region III, DOEd, letter to Superintendent, Fredericksburg City Public Schools, Fredericksburg, VA, re: Complaint No. 03–80–1152, Jan. 22, 1981, 257 EHLR 205, 207.

[171] *See* William H. Thomas, Regional Director, OCR, Region IV, DOEd, letter to William Reeves, Superintendent, Winston County School District, Double Springs, AL, re: Complaint No. 04–85–1226, Oct. 17, 1985, 352 EHLR 66, 70.

Over the past three decades, the use of computer technology in special education has become an increasingly common phenomenon in response to research showing positive effects on achievement by students with disabilities from computer-assisted instruction.[173] One reason for support of computer-assisted instruction in educating students with disabilities is that it encourages positive attitudes in students because the instruction is self-paced, does not "embarrass" students when mistakes are made, and provides immediate feedback that is free of subjective evaluation.[174]

The computer is just one of many tools that are being used to assist students with disabilities. Other examples include equipment such as voice synthesizers and screen readers that can provide learning disabled students with auditory feedback on written work; portable communication boards that can enable nonverbal students to speak; and software tools that can "recreate" a keyboard for students relying on alternate learning approaches.[175] All of these and more play an essential role in addressing the cognitive and social-psychological needs of students with disabilities.

Federal Law and Policy

Statutes Supporting Technology in Education of Students with Disabilities

Since the 1960s, Congress has authorized legislation that reflects the significance of technology in the lives of individuals with disabilities.[176] The U.S. Department of Education's Office of Special Education and Rehabilitative Services' Office of Special Education Programs (OSEP) and National Institute on Disability and Rehabilitation Research administer some of the major technology-related statutes.[177] DOEd's Office for Educational Research and Improvement (OERI) also administers technology statutes and initiatives relevant to disabled and nondisabled students.[178]

Several legislative initiatives support and guide research and development efforts to improve technology access and use for students with disabilities. For instance, under IDEA (Part D, formerly Part G), the Technology, Educational Media, and Materials program funds research and development of applied technology in the education of children with disabilities.[179] The program funds technology development, demonstration, utilization, and media services. Some examples of authorized activities include:

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[172] Gwen Solomon, "The Computer as Electronic Doorway Technology and the Promise of Empowerment," *Phi Delta Kappan*, vol. 74, no. 4 (December 1992), p. 328.

[173] Marozas and May, *Issues and Practices in Special Education*, p. 251. However, Marozas and May note that other researchers found no significant improvement in achievement levels using computer-assisted instruction. Ibid.

[174] Marozas and May, *Issues and Practices in Special Education*, p. 251. Marozas and May note that other studies have found negligible difference in attitudes with the use of CAI. Ibid.

[175] Michael M. Behrmann, "Assistive Technology for Students with Mild Disabilities," *Intervention in School and Clinic*, vol. 30, no. 2 (November 1994), p. 74 (hereafter cited as Behrmann, "AT for Students with Mild Disabilities"); Donna Dutton and Dale Dutton, "Technology to Support Diverse Needs in Regular Classes," in William Stainback and Susan Stainback, eds., *Support Networks for Inclusive Schools* (Baltimore, MD: Paul Brookes Publishing), pp. 179–80; and Alliance for Technology Access, *Computer Resources for People with Disabilities* (Alameda, CA Hunter House Publishers, Inc., 1994), p. 28 (hereafter cited as ATA, *Computer Resources for People with Disabilities*).

[176] These include the Elementary and Secondary Education Amendments of 1967, Pub. L. No. 90–247, Title II, Part A, § 204(a)–(c), Title III, § 301(e), 81 Stat. 783, 813 and the Education of the Handicapped Act Amendments of 1986. Pub. L. No. 99–457, Title IV, § 402, 100 Stat. 1145 (codified at 20 U.S.C. § 1400–1485 (1994)). *See* Judith Fein, "A History of Legislative Support for Assistive Technology," *Journal of Special Education Technology*, vol. 13, no. 1 (Spring 1996), p. 2 (hereafter cited as Fein, "A History of Legislative Support").

[177] Fein, "A History of Legislative Support," p. 1.

[178] DOEd, Office for Educational Research and Improvement, *Building on What We've Learned Developing Priorities for Education Research* (Washington, DC: May 1996), pp. 22–24; DOEd, OERI, *Mission Manual*, Apr. 17, 1995, OERI/ORAD Section, p. 1; and DOEd, OERI, "OERI What We Can Do for You," brochure, ORAD Insert.

- Conducting research and development activities on the use of innovative and emerging technologies for children with disabilities;[180]
- Promoting the demonstration and use of innovative and emerging technologies for children with disabilities by improving and expanding the transfer of technology from research and development to practice;[181] and
- Communicating information on available technology and the uses of such technology to assist children with disabilities.[182]

Since 1987, the program has disseminated more than $35 million for research, development, and evaluation projects.[183] Several current endeavors relate to the educational implications of using assistive technology (AT).[184] "The studies investigate issues that arise when assistive technology is integrated into the full range of school-related activities and the effects of its use on a broad range of outcomes."[185] The organization administering the project grants, OSEP, anticipates that study results will provide information on the educational impact of assistive technology on the learning process of students with disabilities.[186]

OERI supports special education research to develop innovative procedures to improve the access of students with disabilities to education opportunities.[187] Some of these endeavors relate to the uses of technological devices to enable disabled students to benefit from their education and improve their learning, as well as monitor student progress.[188]

In 1988, Congress acknowledged the powerful role that assistive technology and services can have for individuals with disabilities by passing the Technology-Related Assistance For Individuals with Disabilities Act of 1988, popularly referred to as the "Tech Act."[189] The Tech Act was one of the first pieces of Federal legislation to address the needs of all individuals with disabilities.[190] With passage of the Tech Act and amendments to the act in 1994,[191] Congress sought to address the inaccessibility for individuals with disabilities of existing and developing telecommunications and information technologies, as well as the problem of inadequate information on the use of assistive technology resources.[192]

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[179] *See* Pub. L. No. 105–17, § 687(a)–687(e) (1997). *See also* Fein, "A History of Legislative Support," p. 2.

[180] Pub. L. No. 105–17, § 687(b)(2)(A) (1997).

[181] *Id.* § 687(b)(2)(B) (1997).

[182] *Id.* § 687(b)(2)(D) (1997).

[183] Fein, "A History of Legislative Support," p. 2.

[184] Ibid.

[185] Ibid.

[186] Ibid.

[187] DOEd, Office for Educational Research and Improvement, *Building on What We've Learned Developing Priorities for Education Research* (Washington, DC: May 1996), p. 23.

[188] Ibid.

[189] Pub. L. No. 100–407, 102 Stat. 1044 (codified as amended at 29 U.S.C. § 2201–2288 (1994)) Congress amended this statute in 1994 as Pub. L. 103–218. *See also* Rehabilitation Engineering Society of North America (RESNA), *The Tech Act Accomplishments to Date* (Arlington, VA: Rehabilitation Engineering Society of North America, September 1996), p. 3 (hereafter cited as RESNA, *The Tech Act Accomplishments*).

[190] Behrmann, "AT for Students with Mild Disabilities," p. 72.

[191] Pub. L. No. 103–218, § 3, 108 Stat. 50 (codified in scattered sections of 29 U.S.C., enacting new sections at 2231, 2241–2246, 2251, and 2281–2288 (1996)).

The Tech Act distinguishes between assistive technology devices and assistive technology services, defining the former as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities"[193] and the latter as "any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device."[194]

Title I of the Tech Act[195] provides discretionary grants to assist States in developing and implementing consumer-responsive and comprehensive programs of technology-related assistance for individuals of all ages.[196] Grants are awarded to all States for a 3-year period, but States can receive funds for up to 10 years.[197] Tech Act State grantees can use Tech Act funds to improve access to and provide assistive technology devices and services.[198]

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[192] *See* 29 U.S.C. § 2201(a)(7) (1994), stating that "Many individuals with disabilities cannot access existing telecommunications and information technologies and are at risk of not being able to access developing technologies. The failure of Federal and State governments, hardware manufacturers, software designers, information systems managers, and telecommunications service providers to account for the specific needs of individuals with disabilities results in the exclusion of such individuals from the use of telecommunications and information technologies and results in unnecessary costs associated with the retrofitting of devices and product systems." 29 U.S.C. § 2201(a)(7) (1994); *see also* Behrmann, "AT for Students with Mild Disabilities," p. 72.

[193] 29 U.S.C. § 2202(2) (1994).

[194] *Id.* § 2202(3) (1994). The Tech Act also clarifies that assistive technology services include:
"(A) the evaluation of the seeds of an individual with a disability, including a functional evaluation of the individual in the individual's customary environment;
(B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by individuals with disabilities;
(C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing of assistive technology devices;
(D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
(E) training or technical assistance for an individual with disabilities, or, where appropriate, [the] the family members, guardians, advocates, or authorized representatives of such an individual; and
(F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of individuals with disabilities." *Id.*, § 2202(3)(A)–(F) (1994).

[195] 29 U.S.C. §§ 2211–2217 (1994).

[196] *Id.* § 2211(a) (1994) (Stating that "The Secretary of Education shall make grants to States . . . to support systems change and advocacy activities designed to assist States in developing and implementing consumer-responsive comprehensive statewide programs of technology-related assistance. . .").

[197] *Id.* § 2212(a) (1994); and Pub. L. 103–218, Title I, Section 102(a). Initial extension grants are awarded to States for a period up to 2 years, based on States' progress in carrying out systems change and advocacy activities. *See* 29 U.S.C. § 2213(a)(1) (1994); and Pub. L. 103–218, Title I, section 103(a)(1) and (b)(1). Second extension grants are awarded to States for a period up to 5 years, based on continued progress in carrying out systems change and advocacy activities; identifying future funding options and program commitment from the public and private sector, and other organizations; and meeting other standards. *See* 29 U.S.C. § 2213(a)(2) (1994); and Pub. L. 103–218, Title I, section 103(a)(2) and (b)(2).

[198] Tech Act grantee activities include supporting activities to increase access to and funding for assistive technology, including the development and evaluation of the efficacy of model delivery systems that provide assistive technology devices and services; identifying and coordinating Federal and State policies, resources, and services, relating to the provision of assistive technology devices and services, including entering interagency agreements; convening interagency work groups to enhance public funding options and to coordinate access to funding for assistive technology devices and services for individuals with

As amended in 1994,[199] the Tech Act requires States to perform "systems change" and advocacy activities intended to modify laws, policies, and practices to increase access of individuals with disabilities to assistive technology.[200] For example, States must work to reach underrepresented and rural populations to improve their access to assistive technology services.[201] To date, State projects have conducted aggressive outreach to Hispanic, black, and Native American populations[202] and have made efforts to address concerns related to rural districts through various approaches.[203]

Technology-Related Requirements of the IDEA

The definitions of assistive technology devices and services that appear in the Tech Act of 1988 were adopted as part of the IDEA in 1990.[204] The IDEA defines an "assistive technology device" as "any item, piece of equipment or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of individuals with disabilities."[205] The IDEA defines an "assistive technology service" as "any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device." [206] IDEA also provides examples of assistive technology services, such as:

- Evaluation of needs of such child (with a disability), including a functional evaluation of the child in his/her customary environment;[207]
- Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by such child;[208] and
- Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs.[209]

The provisions of the IDEA pertaining directly to assistive technology are the following:

> Each public agency shall ensure that assistive technology devices or . . . services, or both . . . are made available to a child with a disability if required as part of that child's

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disabilities; conducting a statewide needs assessment that may be based on data including estimates of the numbers of individuals with disabilities within the State, categorized by residence, type and extent of disabilities, age, race, gender, and ethnicity. *See* 29 U.S.C. § 2211(a)–(c) (1994).

[199] Pub. L. No. 103–218, § 3, 108 Stat. 50 (codified in scattered sections of 29 U.S.C., enacting new sections at 2231, 2241–2246, 2251, and 2281–2288 (1994)).

[200] RESNA, *The Tech Act Accomplishments*, p. 3.

[201] Ibid., p. 5.

[202] Ibid. Specific State outreach grantees endeavors include disseminating information about assistive technology to Hispanic consumers; developing comprehensive plans that target disabled blacks of all ages to increase their access to assistive technology; and utilizing a community liaison to address the needs of Native Americans. The Tech Act allows States the flexibility to determine specific approaches to accomplish these endeavors. Ibid.

[203] Ibid. Services to improve accessibility to technological services for disabled individuals in rural localities include use of mobile vans and establishment of numerous regional centers. The Tech Act allows States the flexibility to determine specific approaches to accomplish these endeavors. Ibid.

[204] Behrmann, "AT for Students with Mild Disabilities," p. 72.

[205] Pub. L. 105–17, § 602(1) (1997).

[206] *Id.* § 602(2) (1997).

[207] *Id.* § 602(2)(A) (1997).

[208] *Id.* § 602(2)(B) (1997).

[209] *Id.* § 602(2)(D) (1997).

> (a) Special education under § 300.17 ;
> (b) Related services under § 300.16; or
> (c) Supplementary aids and services under § 300.550(b)(2).[210]

Thus, the IDEA regulations require that assistive technology devices or services be made available to students with disabilities as part of special education, related services, or supplementary aids and services that permit disabled students to be educated in regular classes.[211] The IDEA regulations also require that assistive technology for disabled students be considered by a school district on an individual basis as part of the process of developing a child's Individualized Education Program (IEP).[212] OSEP stated:

> [i]t is impermissible to deny assistive technology to a child with handicaps before a determination is made as to whether such technology is an element of a free appropriate public education (FAPE). Consideration of a child's need for assistive technology must occur on a case-by-case basis in connection with the development of the Individualized Education Program.
>
> Under IDEA, State and local education agencies are mandated to ensure that disabled children receive FAPE, which includes special education and related services . . . in conformity with the IEP.[213] . . . This list of related services under IDEA is "not exhaustive and may include other developmental, corrective, or other supportive services . . . if they are required to assist a handicapped child to benefit from special education." Under IDEA, "assistive technology" could qualify as "special education" or "related services." The determination of an appropriate educational program for a student with disabilities must be tailored to his or her needs . . . and reflected in the content of the IEP.[214] If assistive technology is determined as required related services, then a student's IEP must specifically indicate the nature and amount of these resources.
>
> Similarly, to ensure that students with disabilities are educated in the least restrictive environment (LRE), special education, separate schooling, or other forms of removal from the regular classroom, with nondisabled peers, can occur only if the nature or severity of the disability is such that education in the regular class room with the use of supplementary aides or services cannot be achieved satisfactorily. Assistive technology is a necessary supplementary aid if its provision (along with other determined aids) supports a student's ability to remain and be successful in the least restrictive environment; and its absence would require the student's placement in a more restrictive setting. Supplementary aides and services, or modifications to the regular classroom, determined necessary to facilitate education in the least restrictive environment, must be stipulated in the student's IEP.[215]

Under the IDEA, school districts must provide students with disabilities assistive technology devices and services if such resources are determined warranted and clearly addressed in the students' IEPs.[216] If the IEP team, for instance, determines that a particular type of assistive technology is mandatory for home use for a student to receive a free appropriate public education, then the device must be made available to implement the IEP. A school district is not permitted to deny a request for a device to be provided for home use, especially since a school board cannot unilaterally change any statement in an IEP or refuse to pay for any service determined necessary for a disabled student's education.[217] In addition, a school system cannot delay the delivery to a student, of a service mandated as necessary once an IEP is finalized.[218] The IDEA and implementing regulations require that immediate provision of services is necessary for a child to receive a free appropriate public education.[219]

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[210] *Id.* § 687(b) (1997); 34 C.F.R. § 300.308 (1996).

[211] 34 C.F.R. § 300.308 (1996). *See also* Judy Schrag, Director, Office of Special Education Programs, letter to Susan Goodman, Aug. 10, 1990, *reprinted in* 17 IDELR 1317 (hereafter cited as Schrag letter).

[212] *See* 57 Fed. Reg. 44,798 (1992). *See also* Schrag letter, pp. 1–2.

[213] Schrag letter, p. 1 (citing 20 U.S.C.§ 1401(18); 34 C.F.R. § 300.4(a) and (d) (1994)). IDEA requires that all students must be provided with assistive technology, as needed for delivery of a free appropriate education (FAPE). The only exception is the provision of medical devices. *See* Diane Cordry Golden, "It's the Law. Now, How Do I Do It?" (Independence, MO: Missouri Assistive Technology Project), p. 2. Distinguishing between a device required for FAPE and a resource or service, such as computer instruction, which is considered more than appropriate, can be difficult. *See* ibid., p. 3. If no adaptations are made to computers used by students with disabilities, then those educational resources could be considered as a "method of instruction" (rather than assistive technology) for which there are equally effective substitutes. *See* ibid., p. 3.

[214] Schrag letter, p. 2.

[215] Schrag letter, pp. 1–2 (citing 34 C.F.R. Part 300).

[216] Rehabilitation Engineering and Assistive Technology Society of North America, *Assistive Technology and the IEP* (Arlington, VA: RESNA, August 1992), p. 17 (hereafter cited as RESNA, *Assistive Technology and the IEP*).

Strategies to Incorporate Assistive Technology Into the IEP Process: Recommendations from RESNA and Various States

Under contract to DOEd's National Institute on Disability and Rehabilitation Research, the Rehabilitation Engineering Society of North America (RESNA) produced a technical assistance document on how to incorporate assistive technology in the IEP process. The document indicates that if an assessment team reveals that a student is eligible for special education or accommodations, then the multidisciplinary team should consider the possibility of assistive technology when making recommendations for the IEP.[220] For instance, as data are being collected for the present level of performance section on the IEP, part of that assessment can be a determination of whether or not assistive technology is necessary for the student to achieve educational or social goals.[221] The assessment should analyze the standards expected of a particular youngster's nondisabled peers of the same age and determine the number of these requirements that could be completely or partially fulfilled by the student being assessed if he/she had access to assistive technology.[222]

According to RESNA, an educational specialist on the special education evaluation/assessment team should understand the requirements of a school's entire curriculum, and analyze how assistive technology can be used to enable students with disabilities to access virtually any core or elective course and participate in the array of (normal) activities along with his or her nondisabled peers. Therefore, an education specialist must know about the range of assistive technology devices and their potential to aid students in meeting or approximating educational goals.[223]

Inclusion of assistive technology in the IEP must be clearly stated. The recommended provision of technological devices or services must specify how and why the recommended technology is necessary and how it will be used to accomplish a particular goal.[224] Assistive technology can appear in the IEP in three potential places:

- in the annual goals and short term objectives;[225]
- in the enumeration of supplementary aids and services needed to maintain the student in

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[217] Michael Morris, "The Right to Take Assistive Technology Home from School," *Assistive Technology Quarterly*, vol. 3, no. 2 (hereafter cited as Morris, "Take AT Home").

[218] Ibid.

[219] Ibid.

[220] RESNA, *Assistive Technology and the IEP*, p. 10.

[221] Ibid., p. 11.

[222] Ibid., p. 10.

[223] Ibid., p. 11.

[224] Ibid., p. 14; and Rehabilitation Engineering Society of North America, "Technology and the Individualized Education Program: A Primer for Parents and Professionals," *Technology and Disability*, vol. 3, no. 3, p. 105 (hereafter cited as RESNA, "Primer for Parents").

[225] RESNA, *Assistive Technology and the IEP*, p. 13; and RESNA, "Primer for Parents," p. 105.

the least restrictive setting, and enable him to function and make reasonable progress in a regular classroom;[226] and

- in the list of related services necessary for the student to benefit from his or her education.[227]

With respect to annual goals and short-term objectives on an IEP, the IEP document must clearly stipulate the role of assistive technology.[228] The plan should identify, describe, and estimate the educational performance and additional milestones to be accomplished during the course of an academic year.[229]

Students with disabilities are guaranteed the right to be placed and remain in the least restrictive environment.[230] To be successful in this setting, students are provided with the necessary supplementary aides and services.[231] A variety of assistive technology devices that compensate for disabilities and allow a student to perform educational and social goals and tasks can be included among supplementary aides utilized to facilitate an education in the regular classroom.[232] Assistive technology is a necessary supplement if its use (along with the presence of other necessary aides) supports the student sufficiently to maintain his regular class placement, and its absence requires the student's transfer to a more restrictive setting.[233]

Children and youth receiving special education have the right to receive related services necessary to benefit fully from special education instruction.[234] According to OSEP's Judy Schrag, the list of related services under IDEA is "not exhaustive and may include other developmental, corrective, or other supportive services . . . if they are required to assist a handicapped child to benefit from special education."[235] Through this specific provision of the law, school systems provide students with disabilities assistive technology devices and services that are determined warranted by a comprehensive evaluation.[236] According to RESNA, for a student to be successful in using assistive technology in the educational process, he must be instructed in its use.[237] Training for a student with an emotional disturbance to use an augmentative communications device can be considered as a related service that provides support to the student's particular educational program.[238]

For technology to be used effectively, parents need to be aware of their rights with respect to provisions of assistive technology devices and services for a child.[239] They have the right to:

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[226] RESNA, *Assistive Technology and the IEP*, p. 13; RESNA, "Primer for Parents," p. 105; and Schrag letter, p. 2.

[227] RESNA, *Assistive Technology and the IEP*, p. 13; RESNA, "Primer for Parents," p. 105; and Schrag letter, p. 1.

[228] RESNA, *Assistive Technology and the IEP*, p. 14.

[229] Ibid., pp. 13–14; and RESNA, "Primer for Parents," p. 105.

[230] Pub. L. No. 105–17, § 612(a)(5) (1997).

[231] RESNA, "Primer for Parents," p. 106.

[232] Ibid. and Schrag letter, p. 2.

[233] RESNA, "Primer for Parents," p. 106.

[234] 34 C.F.R. § 300.16 (1996); and RESNA, *Assistive Technology and the IEP*, p. 2.

[235] Schrag letter, p. 1 (citing 34 C.F.R. § 300.13(b)(1)–(13)—currently §.16(b)(1)–(14)).

[236] RESNA, *Assistive Technology and the IEP*, p. 17.

[237] Ibid.

[238] Ibid.

[239] Ibid., p. 12.

- Express their dissatisfaction with an evaluation by requesting that the school district pay for an independent evaluation by a professional other than the school staff;[240]
- Request that certain services, such as assistive technology, be included in their child's IEP;[241]
- Obtain assistance from schools in selecting and acquiring devices and equipment as well as instruction in their use;[242] and
- Challenge schools' decisions with respect to provisions of technological devices and services by requesting a hearing.[243]

State Policies on Assistive Technology

Various States have written guidebooks for school districts, educators, and parents of students with disabilities on their responsibilities regarding the provision of assistive technology under the IDEA. For example, in January 1997, the State of Montana's Department of Education published a manual for prospective assessment team staff on "interpreting and using the procedures under IDEA to make decisions about students' needs for educational technology."[244]

In April 1996, the State of Hawaii's Department of Education and the State Tech Act grantee, Hawaii Assistive Technology Training and Services Project (HATTS), completed *Procedural Guidelines for Assistive Technology.*[245] In producing the document, they were motivated by several concerns, including compliance with IDEA regulations as related to the provision of assistive technology to students with disabilities. In addition, the two organizations were concerned about the assistive technology funding barriers. They concluded that schools' tendency to be budget-conscious had prevented educators and parents from being informed about assistive technology, deprived students of their rights to obtain technological devices and services, and misinformed schools about their responsibilities to provide assistive technology at no cost to students.[246]

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[240] Ibid.

[241] Christopher Button, "Fast Facts on IEPs," *Assistive Technology Quarterly,* vol. 2, no. 5, p. 5.

[242] Howard P. Parette, Jr., Jack J. Hourcade, and Alan VanBiervliet, "Selection of Appropriate Technology for Children with Disabilities, *Teaching Exceptional Children,* vol. 25, no. 3, Spring 1993, p. 2 (hereafter cited as Parette et al., "Selection of Appropriate Technology,").

[243] RESNA, *Assistive Technology and the IEP,* p. 12. According to Pub. L. 103–218, section 102(e)(20)(A) and (B) and section 102(f)(4), each Tech Act grantee must utilize each fiscal year between $40,000 and $100,000 of its grant funds (amount based on State population and geographic size) for protection and advocacy services. State grantees must make a grant to, or enter into a contract with, an entity to support protection and advocacy services through the systems established to provide protection and advocacy under the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6000 *et seq.*), the Protection and Advocacy for Mentally Ill Individuals Act (42 U.S.C. 10801 *et seq.*), and section 509 of the Rehabilitation Act of 1973 (29 U.S.C. 794e). Students and parents of students with disabilities are entitled to utilize these legal services with respect concerns related to a school's provision of technological services and devices in special education programs.

[244] Marilyn Pearson, IDEA Part B Coordinator, Montana Department of Public Instruction, telephone interview, Dec. 19, 1996 (hereafter cited as Montana DPI interview). The manual defines educational technology for students with disabilities as any device or service that enables students to gain access to "appropriate" education programs and benefit from that education. Topics include strategies to evaluate students for assistive technology, appropriate instruments to use in the assessment process, interpreting results of a comprehensive assessment, effective devices to meet student (with various disabilities) needs, and determining how a particular technological device is relevant to a student's education program). Ibid.

[245] Judith Clark, Information and Resource Coordinator, Hawaii Technology Training and Services Project (HATTS), telephone interview, Dec. 17, 1996 (hereafter cited as HATTS interview); and June Callen, Director, Community and Special Education Branch, Office of Instructional Services, Hawaii Department of Education, telephone interview, Dec. 19, 1996 (hereafter cited as HI DOE Interview). The Tech Act grantee, HATTS, purports that the manual will help to ensure compliance with the IDEA. Although the State of Hawaii has not had any court cases to date in which disabled students claimed that they were denied appropriate technological devices/services to meet their educational needs, Hawaii's Protection and Advocacy Agency has written letters to the State's Department of Education, mentioning potential violations of the IDEA with respect to depriving students of particular devices needed to meet IEP goals and objectives. *See* HATTS interview.

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Some of the major areas addressed in Hawaii's *Procedural Guidelines for Assistive Technology* are the Federal definitions of assistive technology devices and services;[247] explanations of the process used to assess students for their potential need for assistive technology;[248] summary information on free appropriate public education and the *Board of Education v. Rowley* case and the relevance to assistive technology;[249] and strategies to incorporate assistive technology on an IEP form, as a related service, supplementary aide, or goal/objective.[250]

Various States and school districts have established deliberate policies to incorporate assistive technology into the IEP process, from evaluation, to discussion at meetings with parents, to inclusion onto an IEP form, and ultimately to provision for a student's use.[251] Hawaii's State education agency, for example, requires schools to identify the students already participating in special education programs who have not been evaluated previously for their possible ability to benefit from assistive technology.[252] The assessment team must initially address whether each of these students is making reasonable progress toward IEP goals and objectives without the use of assistive technology as part of the current instructional program.[253] If not, the assessment team should proceed with additional evaluation procedures to determine whether assistive technology should be recommended as a related service or supplementary aid.[254]

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[246] HATTS interview. Both HATTS and the State Department of Education are determined to improve parents' awareness about assistive technology; advise them about their rights to technological services; educate them about strategies to determine which devices and tools are appropriate based on their child's specific strengths and weakness; and inform them that these devices and services must be addressed at official IEP evaluations, and conferences for the State of Hawaii to finance the expenditures. Ibid.

[247] State of Hawaii, Department of Education, Office of Instructional Services, Community and Special Education Branch, *Procedural Guidelines for Assistive Technology* (Honolulu, HI State Department of Education, April 1996), p. 2 (hereafter cited as HI DOE, *Hawaii Guidelines*).

[248] Ibid., pp. 3 and 6. The guidebook includes explanations of and documents (flowcharts) on the IEP student evaluation process, beginning with the formation of an assistive technology support team, to consulting the general IEP team, to conducting the assessment, and ultimately making recommendations for a student. Ibid., p. 6.

[249] Ibid., p. 4.

[250] Ibid., pp. 7–10. The document includes examples of IEP statements that incorporate particular technological devices as related services, supplementary aides, and as resources to meet annual goals and short-term objectives. Ibid.

[251] RESNA, *Assistive Technology and the IEP*, pp. 10 and 17; and Nancy Meidenbauer, Project Associate, Rehabilitation Engineering Society of North America, interview in Arlington, VA, Dec. 18, 1996.

[252] HATTS interview.

[253] HI DOE, *Hawaii Guidelines*, p. 3.

[254] Ibid. Various other States have addressed strategies to incorporate assistive technology into the IEP process. For example, the State of Colorado has included a specific category regarding technological devices and services directly onto their respective IEP forms. *See* Shirley Swope, Parent Advisor, Colorado Parent Information and Training Center, telephone interview, Dec. 18, 1996 (hereafter cited as Colorado interview). In addition, the State mandates that the IEP committee address if a child determined eligible for special education services needs assistive technology. If a child was not directly assessed as needing assistive technology, a parent can demand a reevaluation. Ibid. The State of Indiana clearly stipulates that all local education agencies must provide an assistive/augmentative technology evaluation to each student determined (by a case conference committee) in need of this assessment. In Indiana, although school staff are permitted to conduct a student evaluation, schools also have the option of selecting outside consultants (who may be more familiar with assistive technology) to conduct the evaluation. The State also has criteria that school districts should follow when selecting appropriate evaluators (e.g., number and type, credentials/qualification/licensure). *See* Gleena Greever, "Special Education Update Indiana's Assistive Technology Policy Clarified," (Indiana Department of Education), *as reprinted* in RESNA, *Assistive Technology and the IEP*, p. 40. The Springfield, Illinois, Public Schools have also incorporated assistive technology onto an IEP form, by requiring schools to list the "specialized equipment and adaptive devices" determined necessary, in

Uses of Assistive Technology for Students with Disabilities

From a functional perspective, assistive technology is any device, adaptive equipment, or service that enables people with disabilities to accomplish a task that would otherwise not be possible.[255] Assistive technology should be used to address the educational needs of students with cognitive and other learning disabilities—the majority of individuals in special education.[256] Most of these students do not exhibit any of the physical or sensory impairments that are typically associated with the need for assistive technology.[257] However, the Tech Act's definition of assistive technology is sufficiently broad and applies to increasing, maintaining, or improving the functional capabilities of any disabled student—including students with cognitive and emotional disabilities who are addressing their functional capabilities, such as ability to read, write, process information, use computers in academic activities, and engage in other learning activities.[258]

With the support of assistive technology, students with disabilities have learned to communicate more effectively, develop their organizational skills, improve their ability to process information, and control their environments.[259] For example, assistive technology can be used to reduce distractions that can motivate maladaptive behaviors that sometimes occur in students with behavioral and emotional disturbances.[260] Also, individually customized communications software and voice synthesizers can enable students with reading difficulties to access computers.[261]

Students with disabilities often encounter obstacles that, in the past, have precluded them from gaining access to and participating in the regular education environment.[262] However, as the trend towards inclusion gains momentum, students with a wide range of mild and severe disabilities are being integrated into the regular education classroom, compelling regular education teachers to address their educational needs.[263] Assistive technology has alleviated the demand for support services that are available only in more restrictive environments. For example, students with learning disabilities may have difficulty assessing what they have learned during any given lesson; therefore, a software program that provides feedback and self-monitoring activities can be beneficial.[264] Evidence shows that some special education students who are

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order for a child to achieve goals and objectives. *See* RESNA, *Assistive Technology and the IEP*, p. 10 and appendix.

[255] VA's Assistive Technology System, *Assistive Technology for Children and Adolescents: Where to Get it and How* (Richmond, VA: Department of Rights of Persons with Disabilities and Virginia Assistive Technology System, 1996), sec. 2, p. 4.

[256] Behrmann, "AT for Students with Mild Disabilities," p. 73.

[257] Ibid.

[258] Ibid.

[259] Fein, "A History of Legislative Support," p. 1.

[260] Nicki Ellerd, Family Support Specialist, Montana Parent Information and Training Center, telephone interview, Dec. 18, 1996 (hereafter cited as Ellerd interview). An auditory trainer can be used in the classroom to assist students who are easily distracted by their peers and environment overall. *See* Ellerd interview. The device enables a student to better focus on a dialogue with his orher teacher. *See* ibid. With this device, a teacher speaks into a microphone, and a student wears a headset which has intensity controls. *See* Abstract for "Fonator System" (Piscataway, NJ: Siemens Hearing Instruments, 1996). The student-worn receivers block out background noise and heighten student's attention. *See* ibid. To avoid appearing conspicuous, auditory trainers can resemble wearable cassette players. *See* Abstract for "Easy Listener" (Phonic Ear, Inc.: Petaluma, CA, 1996).

[261] RESNA, *Assistive Technology and the IEP*, p. 6; and Albert Cavalier et al., "Technology and Individual Differences," *Journal of Special Education Technology*, vol. 12, no. 3 (Spring 1994), p. 179.

[262] Behrmann, "AT for Students with Mild Disabilities," p. 74.

[263] Ibid.

hesitant about finishing tasks without relying on the teacher at the completion of each step, are willing to work independently on their assignments when they are provided a computer and its assistive peripherals and devices.[265]

Similarly, computers and word processors can be an effective form of assistive technology to address writing barriers that confront students with disabilities, including mechanics (e.g., spelling and grammar), organizing thoughts, and expressing them in writing.[266] For instance, word prediction software enables a learning disabled student to write independently, use a higher vocabulary level, and improve use of sentence structure, since concentration on spelling words accurately can be reduced.[267] Because the computer as a writing tool can provide relief for time-consuming pressures of forming and spelling words correctly, youngsters can be more productive and acquire opportunities to experiment, improvise, and discover other uses of the system, and gain enrichment from educational programs.[268]

Another example of an application of assistive technology for students with disabilities is a notebook computer that is adapted with a screen reader and voice synthesizer, which enables a multisensory learning disabled student to have auditory feedback as he or she revises lecture notes.[269] An application of assistive technology for students lacking verbal skills, including some students with severe learning disabilities, mental retardation, and serious emotional disturbances who may be withdrawn and have difficulty expressing themselves orally, allows communica-

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[264] Livesay and Murray, "Technology Integration," p. 14.

[265] Mary Male, *Technology for Inclusion: Meeting the Special Needs of All Students*, 3rd ed. (Boston: Allyn and Bacon, 1997) p. 53. For students with reading deficits, various reading comprehension programs can be both diagnostic and prescriptive, and break down direct, integrated reading comprehension into five manageable steps (e.g., determining main ideas and details, distinguishing facts from opinions, vocabulary knowledge, determining sequences of events, and developing inference skills). *See* Carol Buchter and Ron Buchter, "Teachers Guide to Descriptive Reading" (Freeport, NY: Educational Activities, 1996). Some of these programs assess students' level in each component, and students are automatically placed at reading levels for each of the independent, specific strands, and given practice exercises. Ibid. Because this type of computer technology is both interactive (i.e., more than a "textbook/workbook on a screen") and intended for independent use (i.e., without teacher assistance), the students are able to receive immediate, yet "private" feedback. Ibid.

[266] Behrmann, "AT for Students with Mild Disabilities," p. 75.

[267] Council for Exceptional Children, *Today*, vol. 3, no. 2 (August 1996), p. 5 (hereafter cited as CEC, *Today*, August 1996). Students with learning disabilities who are poor spellers often have limited vocabularies because they avoid words they cannot spell correctly. Other students may not find a word they need with a spell check program. *Word prediction* software addresses these barriers by providing continuous updated lists of words, as students type successive letters within a particular word. As previously unfamiliar words are learned, students can build their vocabularies. *See* National Center to Improve Practice, *Profiles 2* (Newton, MA: NCIP, Spring 1995), p. 2.

[268] Computer Resources for People with Disabilities, p. 115. To use this program during entry of text, a student types the beginning letter of a word; and then the computer generates a list of possible (usually "high frequency") words with that letter, which enables the student to efficiently select the word that is most appropriate. If the student's target word does not appear after the first letter is typed, an updated list can appear as additional letters of a given word are typed. *See* Behrmann, "AT for Students with Mild Disabilities," p. 76; Judith Zorfass et al. "Promoting Technology in Special Education: Supporting Change Agents" *Technology and Disability*, vol. 3, no. 2 (1994), p. 163 (hereafter cited as Zorfass et al., "Change Agents"); and National Center to Improve Practice, *Profiles 2*, Spring 1995, p. 1.

[269] Behrmann, "AT for Students with Mild Disabilities," p. 74. Text can be read after input; and the screen reader can command the synthesizer to spell words letter by letter, read whole words, lines, sentences, paragraphs, pages, as well as entire documents. *See* ibid., p. 76. Audio-reinforcement can enable multisensory students to detect grammar, punctuation, spelling, and language usage errors when they hear the words and sentences in addition to reading them. *See* ibid. Students with reading and writing problems benefit from voice output if their ability to recognize errors in text is better in their spoken rather than written form. *See* ibid. Furthermore, research on students with mental retardation revealed that they improved their ability to decode and process information by using a voice synthesizer in conjunction with a word processor. *See* Dutton and Dutton, "Technology to Support Diverse Needs," p. 173 (citing L. Meyers, "Bypassing the Prerequisites: The Computer as a Language Scaffold," *Closing the Gap*, vol. 5, no. 1 (February/March 1987).)

tion through the use of alternative communication devices.[270]

These examples of the use of assistive technology are evidence that it is possible for students with disabilities to participate with their nondisabled peers in virtually any "normal" learning activity.[271] For students who need support to be successful in a regular classroom, assistive technology can serve as an "equalizer." For instance, a computer can serve as a link between special and regular education activities, because it is a device that is under the control of the student.[272] Assistive technologies can be used in accomplishing such objectives as increasing instructional time for students with disabilities without increasing demands on the teacher.[273]

Professionals Responsible for Integrating Technology Into the Education of Students with Disabilities

Some school districts employ technology coordinators whose full-time duties focus on special education programs. The special education technology specialist also is referred to as assistive technology specialist or integrated technology specialist.[274] According to the National Clearinghouse for Professions in Special Education, the position of integrated technology specialist evolved from the Education for All Handicapped Children Act in 1975 and its 1990 reauthorization (and renaming to IDEA).[275] Assistive technology specialists work as team members with regular and special education teachers, therapists, and parents.[276] They generally have the expertise[277] to provide classroom technology support; assistance in accommodating the limitations of students with disabilities; recommendations for software, devices, or equipment; and assistive technology training.[278]

In a special education classroom, the assistive technology specialist can use his/her computer skills to provide on-call support. For instance, with respect to a nonverbal student's malfunctioning, daily-used alternative communication device, an assistive technology specialist can recommend an equally effective piece of equipment until the device is repaired.[279] These specialists also can assist numerous special educators by providing information and support; give assistance in operating computers and using additional equipment, such as a device that assists students with spelling deficiencies; and offer suggestions for classroom instructional approaches.[280]

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[270] Dutton and Dutton, "Technology to Support Diverse Needs," p. 180. A severely withdrawn, nonverbal student can use a portable computerized communication board with built-in software and a voice synthesizer to provide spoken output to listeners. *See* Dutton and Dutton, "Technology to Support Diverse Needs," p. 179. With a communication board, a student points to letters, words, icons, photographs, or pictures that can be programmed by the user, parent, and/or teacher to vocalize various phrases. *See* ibid. By touching a particular character represented on the overlay, the synthesized speech is activated. *See* ibid.

[271] Behrmann, "AT for Students with Mild Disabilities," p. 74.

[272] Dutton and Dutton, "Technology to Support Diverse Needs," p. 167.

[273] Kyle Higgins and Randall Boone, "Hypermedia CAI: A Supplement to an Elementary School Basal Reader Program," *Journal of Special Education Technology*, vol. XI, no. 1 (Summer 1991), p. 2.

[274] National Clearinghouse for Professions in Special Education, "Special Education Technology Specialist" (NCPSE: Reston, VA, Fall 1996), p. 1 (hereafter cited as NCPSE, "SETS").

[275] NCPSE, "SETS," p. 2. Because this position is still considered "new," it has not yet been incorporated into the U.S. Department of Labor biannual *Occupational Outlook Handbook*. Ibid., p. 2.

[276] NCPSE, "SETS," p. 1.

[277] Currently, no licensing process exists for the profession, but some States require a teaching certificate to be hired as a technology coordinator. *See* NCPSE, "SETS," p. 2.

[278] Ibid., p. 1.

[279] Ibid., p. 2.

A special education technology coordinator may work directly with an individual disabled student who needs, for instance, to be measured and "fitted" for a particular technological device as well as instructed in that particular device's use.[281] Similarly, the specialist may be responsible for teaching an entire class of learning disabled students about becoming more "connected to the world through computers" through the use of the internet and e-mail.[282]

Barriers Limiting Effective Integration of Technology

A number of barriers can prevent the effective use of technology in educating students with disabilities. Some of these barriers are the same as those faced by regular education students. For instance, most schools do not have enough computers or upgraded hardware and software necessary to use computers as an integral part of the instructional program.[283] Some writers have estimated that nationwide there is one computer for every 30 students.[284] As late as 1989, students may have used computers for only 1 hour per week, or about 4 percent of instructional time.[285] Although there has been rapid growth in the number of computers in schools, the opportunity for any one student to have access still is limited.[286] An additional major barrier that can affect students with disabilities' access to educational technology is the shortage of classroom teachers who are skilled in operating various devices and pieces of equipment.[287] The lack of widespread expertise among special education personnel can parallel the insufficient specific technology training among educators in general.

Major barriers faced by school districts in the provision of technology in special education programs include: insufficient financial resources, and the impact on maintaining pace with the rapid changes in technology; as well as the limited technological expertise among special educators.[288] Furthermore, although technology can foster individualized instruction, compensate for and bypass students' limitations, and extend their abilities, it can place students with disabilities further at risk if it is not sensitive to various human factors.[289] The types of software selected by an instructor or curricular specialist can be unsuitable to the needs of students with particular disabilities.[290] For instance, some students with learning disabilities and educable mental retardation have disabilities (such as fine motor limitations) that hinder their use of certain mathematical programs which require users to type an answer within a limited number of seconds after a response cue.[291] In addition, schools that purchase technologies that are unduly complex and require a substantial investment in time for instruction of faculty and students frequently encounter widespread resistance to using costly equipment and devices.[292]

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[280] Livesay and Murray, "Technology Integration," p. 15; and NCPSE, "SETS," p. 2.

[281] NCPSE, "SETS," p. 2.

[282] Ibid.

[283] Jane Hauser and David Malouf, "A Federal Perspective on Special Education Technology," *Journal of Learning Disabilities*, vol. 29, no. 5 (September 1996), p. 507.

[284] Ibid. The estimated ratios of students to computer varies. For instance, according to Howard Mehlinger, in 1994, the number of students to computer across all grades was 14 to 1. *See* Howard Mehlinger, "School Reform in the Information Age," *Phi Delta Kappan*, vol. 77, no. 6 (February 1996), p. 403 (hereafter cited as Mehlinger, "School Reform in the Information Age"). According to the Rand Corporation, in the 1994–1995 school year, the ratio of students to computer across K–12 was 12 to 1. *See* Thomas Glennan and Arthur Melmed, *Fostering the Use of Educational Technology: Elements of a National Strategy* (Santa Monica, CA: Rand Corporation, 1996), ch. 2, p. 1 (hereafter cited as Glennan and Melmed, *Fostering the Use of Educational Technology*).

[285] Mehlinger, "School Reform in the Information Age," p. 403; and Hauser and Malouf, "A Federal Perspective on Special Education Technology," p. 507, citing T.S. Hasselbring, "Improving Education through Technology: Barriers and Recommendations," *Preventing School Failure*, vol. 35, no. 3 (1991), pp. 33–37.

[286] Mehlinger, "School Reform in the Information Age," p. 403. For additional information on growth of computers in classrooms, *see* Glennan and Melmed, *Fostering the Use of Educational Technology*, ch. 2, p. 1.

[287] CEC, *Today*, August 1996, p. 15; and Glennan and Melmed, *Fostering the Use of Educational Technology*, chap. 1, p. 7.

[288] CEC, *Today*, August 1996, p. 15; and Chris Morton, "The Modern Land of Laputa," *Phi Delta Kappan*, vol. 77, no. 6 (February 1996), pp. 418–19.

[289] Cavalier et al., "Technology and Individual Differences," p. 176.

Schools must address various barriers that have a potential impact on the provision of computers and peripherals, communication boards, alternate keyboards, and other tools.[293] For example, timely acquisition and overall delivery of assistive technology devices and services can be impeded by cumbersome ordering procedures for equipment and a potential that not all component parts of a device are available at the same time.[294]

Financial Barriers

Cost is a major barrier to the effective use of technology in educating students with disabilities. The primary Federal program that provides financial support for technological devices and services to students in special education programs is the Individuals with Disabilities Education Act.[295] However, funding under this program, as well as under the Tech Act Grant Program, is limited.[296] Consequently, local school districts are the primary source of support for assistive technology funding.[297]

Although this report focuses specifically on students with educable mental retardation, learning disabilities, behavior disabilities, and serious emotional disturbance, the costs to local school districts that must fund (at least in part) devices for all students in special education programs can be a major investment. For instance, according to an association concerned with the education of students with disabilities, expenditures for numerous adapted computers, communication devices, switches, and other technological aides to

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[290] Patricia Hutinger et al., "Assistive Technology Applications in Education Programs of Children with Multiple Disabilities," *Journal of Special Education Technology*, vol. 13, no. 1 (Spring 1996), p. 32.

[291] Ibid. and Patricia Hutinger et al., *State of Practice: How Assistive Technologies Are Used in Educational Programs of Children with Disabilities: Final Report for the Project Effective Use of Technology to Meet Educational Goals of Children with Disabilities*. PR #180R10020 CFDA 84.180R, submitted to the U.S. Department of Education, Technology, Educational Media, and Materials for Individuals with Disabilities Program, August 1994, p. 59 (hereafter cited as Hutinger et al., *State of Practice*).

[292] Parette et al., "Selection of Appropriate Technology," p. 3.

[293] Ellerd interview.

[294] RESNA, *The TAP Bulletin*, September 1996, p. 1. Assistive technology consumers testifying before Congress in the early 1990s before the reauthorization of the Tech Act reported on lengthy waits for acquisition and delivery of technological devices and services ranging from 6 months to numerous years. Despite progress since the enactment of the Tech Act legislation in 1988, there continues to be a lack of coordination of systems to ensure timely acquisition and delivery of assistive technology, especially for children due in part to confusion, particularly among parents and school officials, about the responsible party for funding assistive technology. RESNA, *The TAP Bulletin*, September 1996, p. 1.

[295] RESNA, *Assistive Technology and the IEP*, p. 18.

[296] Mary Male, *Technology for Inclusion: Meeting the Special Needs of All Students*, 3rd ed. (Boston: Allyn and Bacon, 1997) p. 155.

[297] RESNA, "Technology and the IEP," p. 107. In the Commonwealth of Virginia, for instance, more than 60 percent of school districts responding to a survey conducted for the Virginia State Special Education Advisory Committee indicated that most of the funding for assistive technology was provided by localities; only 37 percent indicated it came from the State. *See* Michael M. Behrmann et al. *Assistive Technology Issues for Virginia: Technical Report*, submitted to the Virginia State Special Education Advisory Committee, 1992, as cited in Behrmann, "AT for Students with Mild Disabilities," p. 83.

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enable students with disabilities to benefit from their education can be substantial.[298]

A number of sources indicate that funding difficulties often prevent schools from using technology in the education of students with disabilities. Some of these financial barriers affect their nondisabled peers as well.

- Financial limitations affect the ability of a school district to keep pace with the rapid changes in technology. Unlike most resources and services used in education, computers change rapidly. School budgets generally do not respond well to the rapid pace of change.[299]
- The decision to rewire and equip schools requires a significant financial commitment, and a shortage of funds can impede the integration of technology into the schools.[300]
- Research from the 1990s on "best practices" in education environments that are proactive in accommodating technology reveals that school programs that are committed to integration of computers must be prepared for a high initial investment to purchase the appropriate amount of equipment and software.[301]
- Financial limitations affect the ability of a school district to maintain an adequate and appropriate supply of assistive technology devices, including computer hardware and software and other equipment. A survey conducted by the U.S. General Accounting Office in the mid-1990s revealed that 25 percent of schools lacked sufficient computers to meet instructional needs.[302]
- Results from the 1995 National Center for Education Statistics Survey on Advanced Telecommunications showed that in 55 percent of the Nations' schools, shortages of funds impeded the use and acquisition of technology.[303]
- According to a State of Delaware Assistive Technology Education Task Force, in many

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[298] CEC, *Today*, August 1996, p. 1.

[299] Chris Morton, "The Modern Land of Laputa," *Phi Delta Kappa*, vol. 77, no. 6 (February 1996), p. 419. Schools that intend to purchase one computer system as their entire investment in technological resources for a several-year period are at a disadvantage compared to schools that have a strategic plan and make annual decisions regarding additions and/or upgrades to their existing equipment. *See* Mehlinger, "School Reform in the Information Age," p. 405. According to the National Association of State Boards of Education's School Infrastructure Study, in 1993, 80 percent of all computers in schools lacked memory, were obsolete, and were unable to use current software or support online telecommunications services. *See* NASBE Study Group on School Infrastructure, *Building Our Future: Making School Ready for the 21st Century* (Alexandria, VA: National Association of State Boards of Education, October 1996), p. 7 (hereafter cited as NASBE, *Building Our Future: Making School Ready for the 21st Century*). In addition, according to two researchers in special education technology, the rapid pace of changes in microcomputer technology and educational software can render a device or piece of equipment obsolete within 5 years. *See* Livesay and Murray, "Technology Integration," p. 10.

[300] Mehlinger, "School Reform in the Information Age," p. 407.

[301] Sarah Butzin, "Integrating Technology into the Classroom: Lessons from the Project CHILD Experience," *Phi Delta Kappan* (December 1992), p. 333.

[302] U.S. General Accounting Office, *Technology: America's Schools Not Designed or Equipped for 21st Century* (Washington, DC: General Accounting Office, April 1995), as cited in NASBE, *Building Our Future: Making School Ready for the 21st Century*, p. 9. Various education researchers who focus on the impact of assistive technology for children with disabilities report that funding limitations faced by special education programs can result in a lack of adequate and appropriate software and devices, as well as maintenance of equipment. *See* E. Holder-Brown and J. Parette, Jr. "Children with Disabilities who Use Assistive Technology: Ethical Considerations," *Journal of Special Education*, vol. 47, no. 6., pp. 73–77; H.P. Parette and A. VanBiervliet, "Rehabilitation Assistive Technology Issues for Infants and Young Children with Disabilities: Preliminary Examination," *Journal of Rehabilitation*, vol. 57, no. 3, 1991, pp. 27–36; S. Parker et al. "Barriers to the Use of Assistive Technology with Children: A Survey," *Journal of Visual Impairment and Blindness*, vol. 84, no. 10 (1990), pp. 532–33; and D.B. Reeson and M. Ryan, "Computer Microtechnology for a Severely Disabled Preschool Child," *Child Care, Health, and Development*, vol. 14, pp. 93–104, as cited in Hutinger, *State of Practice*, pp. 7 and 36.

[303] National Center for Education Statistics, Survey on Advanced Telecommunications in *U.S. Public and Elementary Schools: 1995* (Washington, DC: NCES, 1996), as cited in NASBE, *Building Our Future: Making School Ready for the 21st Century*, p. 8.

Delaware school districts, inadequate financial resources presented a significant barrier to the provision of assistive technology to students with disabilities. The task force also reported that school personnel could lack awareness or understanding of funding options and strategies to control costs.[304]

Barriers Associated with Teachers' Training and Attitudes

New technologies demand that students with disabilities and their teachers become proficient in using computers and other high-technology instructional systems.[305] In relying on technology to meet the learning needs of students, teachers must know how to use various equipment and devices. Training on technology should be incorporated into professional development programs for special education teachers.[306] Although teachers may not be the primary source for determining the particular technological devices and services to be used in a classroom, inadequate teacher training on how to use technology can pose a barrier to the effective use of technology in educating students with disabilities.

According to the Council of Exceptional Children, a shortage of expertise exists in the realm of assistive technology and its educational uses for students with disabilities.[307] The lack of widespread expertise among special education personnel can parallel the insufficient specific technology training among educators. For instance, the Rand Corporation recently reported that most educators had not been formally trained in the uses of technology and effective instructional approaches made possible by technology.[308] A survey conducted by the National School Boards Association revealed that teachers were not well-informed about the use of computers.[309] A study conducted by the National Center for Education Statistics showed that 28 percent of teachers lacked awareness of how to integrate certain forms of technology into the classroom.[310] Because of their lack of knowledge about technological resources such as computer software, many educators of students with disabilities had to rely on "word of mouth" recommendations.[311]

One researcher has found that teachers are overwhelmed by their responsibilities and can view encouragement to use technology in classrooms as imposing an additional burden.[312] Educators may have difficulty in finding the time in their schedules to learn about integrating technology into classrooms or to examine various technological devices.[313] In addition, it is possible that isolated negative experiences with inappropriate software can cause some teachers to resist using computers in the class.[314] The Rehabilitation Engineering and Assistive Technology Society of North America (RESNA) reported that regular education teachers could be pressured by the presence in their classrooms of students with augmentative communication devices, communication boards, adapted computers, and other technological resources designed to compensate for disabilities.[315] In contrast, according to the president of Council for Exceptional Children's Technology and Media Division, most teachers are not afraid of or resistant to using technological devices and equipment.[316]

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[304] Delaware Education Task Force, *Recommendations*, p. iii.

[305] Hauser and Malouf, "A Federal Perspective," p. 507.

[306] Hutinger et al., *State of Practice*, p. 4.

[307] CEC, *Today*, August 1996, p. 15.

[308] Glennan and Melmed, *Fostering the Use of Educational Technology*, chap. 1, p. 7.

[309] National School Boards Association, *On Line: Policies and Planning for Educational Technology*. (San Diego, CA: Jostens Learning Corporation, 1989), as cited in NASBE, *Building Our Future: Making School Ready for the 21st Century*, p. 7.

[310] National Center for Education Statistics, Survey on Advanced Telecommunications in U.S. Public and Elementary Schools: 1995 (Washington, DC: National Center for Education Statistics, 1996), as cited in NASBE, *Building Our Future: Making School Ready for the 21st Century*, p. 8.

[311] Livesay and Murray, "Integration of Instructional Technology," p. 14.

[312] Butzin, "Lessons from Project CHILD," p. 331.

[313] Ibid.

[314] Robert Snider, "The Machine in the Classroom," *Phi Delta Kappan*, vol. 74, no. 4 (December 1992), p. 323.

A special education teacher's unawareness of strategies to ensure that a student's potential needs for technology is considered in the IEP process also can pose a barrier to the effective use of technology. According to some researchers, a special education teacher has the potential to assume essential responsibilities as a member of the IEP team, and address the potential role of technology for a disabled student determined eligible to enroll in special education programs.[317] For example, it is possible that teachers could have the responsibility to: (a) determine if a particular student needs an assessment for assistive technology (as part of the comprehensive evaluation), (b) assist with the technology assessment, and (c) participate in subsequent discussions to determine if a particular student must be provided with a specific device to benefit from his or her education. Performing these responsibilities effectively obligates teachers to have significant knowledge about assistive technology (and other related services and supplementary aides, as well as their educational implications).[318] In addition, a special educator would need to have developed the expertise to judge the conditions under which a technological device (rather than a less costly alternative) is an essential element of a free appropriate public education.[319]

Teachers of students with disabilities may not be comfortable with the role of ensuring that technology is considered in the IEP process. In many school districts, special educators depend on the judgment of professionals such as occupational, physical, or speech therapists to conduct the comprehensive evaluations that determine the appropriate services, aids, and devices that enable students with disabilities to remain in the least restrictive environment.[320] However, these auxiliary professionals may view any one disabled pupil and his or her needs from a very different and more narrow perspective than does the child's teacher.[321]

Overcoming Barriers to Using Technology Effectively

Strategies to Overcome Financial Barriers

Although financial barriers to using technology in educating students with disabilities are significant, several sources indicate that they can be overcome. According to a special education researcher who focuses on inclusive education practices, successful local education agencies are able to obtain funds outside their respective districts—through foundation grants, government grants, and business-school partnerships.[322] The researcher stated that strong leadership and support at the district level would lead to grant applications and contacts with potential private sector funding sources.[323]

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[315] RESNA, *Assistive Technology and the IEP*, p. 26.

[316] CEC, *Today*, August 1996, p. 15.

[317] Parette et al., "Selection of Appropriate Technology," p. 2.

[318] Council for Exceptional Children, *CEC Today*, vol. 1, no. 10 (February 1995), p. 13; and Parette et al., "Selection of Appropriate Technology," p. 2.

[319] CEC, *Today*, August 1996, p. 15. If the multidisciplinary team recommends that a particular technological device or service be incorporated into a student's IEP, then that school is mandated by statute to provide that particular resource at no charge to the student's parents. *See* Morris, "Take AT Home," citing Judy Schrag 1990 letter; Schrag letter, pp. 1–2; RESNA, *Assistive Technology and the IEP*, p. 12; Missouri Assistive Technology Project, "Issues in Assistive Technology." Schools are responsible for assisting students and parents in selecting and acquiring devices and equipment, as well as instructing them in their use. Since the incorporation of the terms "assistive technology devices" and "assistive technology services" into the IDEA, school districts and schools have had this responsibility. Parette et al., "Selection of Appropriate Technology," p. 2. *See also* Pub. L. 101–476 and 34 C.F.R. § 300.5. Special education teachers could also be requested to participate in this role as well. Parette et al., "Selection of Appropriate Technology," p. 2.

[320] CEC, *Today*, August 1996, p. 15; and Parette et al., "Selection of Appropriate Technology," p. 2.

[321] Parette et al., "Selection of Appropriate Technology," p. 2.

Various education policymakers have proposed strategies for addressing school districts' financial limitations in acquiring technological devices for students in special education programs.[324] In Virginia, there are numerous sources of funds for assistive technology, such as Federal grants and entitlements, State education and other agency funds, local education funds, and private sector and foundation grants.[325]

In the mid-1990s, Virginia's Tech Act grantee, Virginia Assistive Technology System (VATS), convened a meeting of representatives from 10 agencies to address fiscal barriers to providing assistive technology. The team stressed a need for interagency collaboration and sharing of the fiscal responsibility, as well as public and private partnerships that could improve funding for assistive technology.[326] VATS made several specific recommendations relating to funding for assistive technology, including:

- Offer competitive grant funds for school systems to encourage innovative approaches;
- Develop funding mechanisms that assure equitable access for students to AT; and
- Develop strategies and models to seek external funding to support AT training, devices, and services.[327]

Strategies to Address the Shortage of Technological Expertise

Specialized teacher competencies are needed to use technology effectively in educational programs for students with disabilities—a process that takes time and effort.[328] The National School Boards Association reported that teachers might need up to 5 or even 7 years to become sufficiently comfortable with a technology learning system to integrate it into a curriculum.[329] Extensive training is seen as needed prior to broadening an instructional approach to include the use of technology as a major element of the learning environment.[330]

It is possible that an educator's facility with using certain assistive technology equipment could diminish over time. Various Council for Exceptional Children members suggested that ongoing training and support should be available for special education teachers, especially since one inservice session would not enable teachers to remain abreast of the array of devices and tools that may arise, depart, and reappear in a classroom during any given time.[331]

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[322] Male, *Technology for Inclusion*, p. 187.

[323] Ibid.

[324] For instance, the State of Hawaii claims to be identifying funding and policy-related barriers to the acquisition of assistive technology, and developing strategies to overcome hurdles. HATTS, Brochure on Assistive Technology Training and Services Project, p. 7. The State Department of Human Services, Division of Services for the Blind, is the lead State agency with the Tech Act grant. *See* RESNA, *State Tech Act Project Abstracts* (Arlington, VA: RESNA, March 1996), p. ii.

[325] Behrmann, "AT for Students with Mild Disabilities," p. 83.

[326] Ibid.

[327] Ibid. The Department of Vocational Rehabilitation is the lead State agency with the Tech Act grant. *See* RESNA, *State Tech Act Project Abstracts* (Arlington, VA: RESNA, March 1996), p. i.

[328] Hauser and Malouf, "A Federal Perspective," p. 507.

[329] NSBA, *On-Line: Policies and Planning for Educational Technology* (San Diego: Jostens Learning Corporation, 1989), as cited in NASBE, *Building Our Future: Making School Ready for the 21st Century*, p. 7.

[330] Ibid.

According to RESNA, information about assistive technology and its applications must be disseminated widely among all faculty and staff who participate in programs for students with disabilities.[332] The organization asserted that it was essential for special educators to remain knowledgeable about the most recent advances in technologies that compensate for disabilities, and have a continuous reliable source of support that assisted with problem solving.[333] In addition, RESNA stressed that continuous training opportunities should be available to special education teachers and other professionals who deliver technology services.[334] RESNA also suggested that the provision of information about technology be supplemented with opportunities for special education professionals to experiment and practice with various devices and equipment.[335]

According to the director of the Missouri Tech Act grantee, Missouri Assistive Technology Project, adequate training enables special education staff to make effective decisions and determine appropriate devices and services for students with disabilities.[336] The director wrote that staff knowledgeable about assistive technology were better able to dismiss certain fallacies about devices and make more cost-effective recommendations about related services enabling students to benefit from their education.[337] Well-informed special education professionals were seen as reducing the potential overdemand for technological devices and services designed to compensate for disabilities.[338] The director also stressed that because special education teachers encounter students with disabilities on a daily basis and become familiar with their educational characteristics, it was critical that they be as equipped as possible to evaluate their technological needs.[339]

According to two researchers, special education teachers tend to have less computer experience than do their regular education colleagues.[340] They conclude that technology training opportunities should be long-term and continuously available rather than short-term or periodic.[341] The researchers argue that special education teachers can feel neglected, especially during an initial technology integration phase, if there is a lack of instructional opportunities or support from technically competent staff directed to meet their needs.[342] As the integration of technology into special education programs progresses, the researchers advise that effective training opportunities should be flexible and adapt to classroom teachers' specific knowledge and skill competencies.[343]

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[331] Ibid. In addition, a Council for Exceptional Children member who directs the training for Indiana's Technology Project recommends that a specialist in assistive technology instruct teachers and their classroom aides. *See* ibid.

[332] RESNA, *Assistive Technology and the IEP*, pp. 26–27.

[333] Ibid., pp. 26–27.

[334] Ibid., p. 26. RESNA also promotes its annual and regional meetings, as well as the yearly State conferences associated with the Tech Act grants program, as additional opportunities for educators to improve their skills and obtain information on the most recent developments in technology designed to compensate for disabilities. Ibid.

[335] Ibid.

[336] Diane Golden, "Special Education Assistive Technology Policies: Myth or Reality," (Independence, MO: Missouri Assistive Technology Project), p. 6.

[337] Ibid.

[338] Ibid.

[339] Ibid.

[340] Livesay and Murray, "Integration of Instructional Technology," pp. 12–13.

[341] Ibid., p. 12.

[342] Ibid., p. 13.

Technology in the Special Education Classroom: OCR's Enforcement Efforts

OCR has not included any specific mention of technological facilities such as computers or other high-tech learning tools in the section 504 regulations. OCR has not issued any policy guidance addressing this subject either. However, the section 504 regulations do include two provisions that (1) require schools to provide regular or special education and related aids and services designed to meet the individual needs of students with disabilities as adequately as students without disabilities,[344] and (2) require that facilities, activities, and services identified as being for persons with disabilities be comparable to a recipient school district's other facilities, activities, and resources.[345]

In its enforcement analysis, as observed in a review of case letters, OCR has addressed issues involving technology-related facilities in classrooms. For example, in at least one case, OCR investigated a complainant's allegation that a classroom for a student identified as mentally retarded was not properly equipped because it did not provide computers and appropriate software programs.[346] OCR did not find a violation in this case because, although records revealed the student's parent did request this equipment, "[t]he student's education program does not specifically require these items as part of her instruction."[347] On the basis of this information, OCR determined that "the evidence is insufficient to support this allegation." These brief statements appear to reflect the extent of OCR's investigation and analysis into the matter. OCR does not appear to have questioned the school district's actions with respect to the student's educational program nor does it appear that OCR attempted to determine whether the student could have benefited from the use of a computer or the appropriate software programs.

However, OCR has found a denial of the free appropriate public education requirement when a school district failed to provide a student with assistive technology. In another case, OCR investigated a complaint brought by a parent in Missouri that a school district failed to provide her home-bound son a computer, an assistive device, and a trained teacher for a computer course taught at home.[348]

This discussion of the student's educational program as it relates to his rights under the section 504 regulations seems a wholly different approach than the one taken by OCR in the former case. Policy guidance developing a uniform standard in the analytical approach for cases on "related aids and services" and discussing specific kinds of aids and services such as high tech equipment would appear to be a useful tool for OCR investigative staff.

Costs of Educating Students with Disabilities

During the late 1960s and early 1970s, the growing public awareness of problems facing children and youth with disabilities in public schools prompted strong action by disability advocates, State and Federal courts, and the Federal Government. Numerous cases litigated in the courts uncovered egregious instances of neglect by school districts to address the educational needs

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343 Ibid.

[344] 34 C.F.R. § 104.33(b) (1996).

[345] *Id.*, § 104.34(c) (1996).

[346] *See* John Stephens, Compliance Team Leader, Region VI, letter to William Ortega, Interim Superintendent, Marble Falls Independent School District, Marble Falls, TX, re: Complaint No. 06–95–1256, Jan. 23, 1996, 24 IDELR 575.

[347] *See* ibid., p. 576.

[348] *See* Jesse L. High, Regional Director, OCR, Region VII, DOEd, letter to Thomas Trail, Superintendent, Eldon R–I School District, Eldon, MO, re: Complaint No. 07–85–1168, Jan. 16, 1986, 352 OCR found the school district in violation of the section 504 regulatory provisions at 34 C.F.R. 104.33(a),(b)(1) for failing to "arrange for the complainant's son's usage of equipment and related aids necessary for him to effectively participate in the computer course."

of children with disabilities.[349] The nature of these violations and the public support to change such circumstances encouraged a commitment to educate children and youth with disabilities in public schools. That commitment was translated into legal obligations through various court decisions and settlement agreements[350] and eventually through enactment of the Education for All Children Handicapped Act.[351] The Education for All Handicapped Children Act mandated that public elementary and secondary school systems provide a free appropriate education to all children and youth between the ages of 3 and 21 within their jurisdiction.[352] Schools systems, concerned with their ability to fulfill these obligations, contended that they could not sufficiently finance the education necessary for these students. However, citing severe deficiencies and neglect in the special education system, courts were inclined to reject the argument.[353] The problem prompted a commitment from the Federal Government to provide financial assistance to fund the provision of this free appropriate public education. Congress agreed to fund the excess costs of special education and related services up to a maximum amount.[354]

Despite the Federal commitment to assist States in funding public education for children and youth with disabilities, many public school systems have struggled for a number of reasons to finance the costs of special education. Since 1975, public schools have faced increasing enrollments of children and youth requiring special education and related services. In addition, although the U.S. Supreme Court has clarified that public school systems need only provide special education and related services "sufficient to confer some educational benefit" and not to "maximize the student's potential,"[355] the standard remains vague and has not necessarily translated into lower costs for schools.

Even under this lower standard, some school systems have found that the expenditures necessary to educate even one student with a disability can be high.[356] Although on average the cost of educating students in special education are 2.3 times that of educating students in regular education,[357] for some individual students with disabilities, the costs can be very high. A 1985 study of several school districts found that the cost of educating the average child with disabilities was between one and a half and two times as high as the cost of educating the average child in regular education. However, the costs for individual students with disabilities varied widely, from the low $2,000s to over $25,000 a school year.[358] Therefore, the addition of a single high-cost student with disabilities may have a large impact on a school district's special education spending.

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[349] *See* Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. Bd. of Educ. of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972). *See also* S. Rep. No. 168, 94th Cong., 1st Sess. 7 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1431 (noting "[i]n recent years decisions in more than 36 court cases in the States have recognized the rights of handicapped children to an appropriate education).

[350] *See* Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. Bd. of Educ. of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972).

[351] Pub. L. No. 94–142, 89 Stat. 773 (as amended), *renamed*, the Individuals with Disabilities Education Act, Pub. L. No. 101–476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400–1485 (1994).

[352] Pub. L. No. 94–142, § 5(a), 89 Stat. 780.

[353] *See* Mills v. Bd. of Educ. of the District of Columbia, 348 F. Supp. 866, 876 (D.D.C. 1972) ("[T]he District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources.").

[354] Pub. L. No. 94–142, § 5(a), 89 Stat. 776–77.

[355] Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982).

[356] For example, in Fairfax County, Virginia, the public school system financed the costs of educating one student with mental retardation, Jeffrey Flippin, in a private institution. The costs to Fairfax County public schools for educating Jeff from age 9, when he began attending the institution, to age 21 have totalled more than $500,000. Robert O'Harrow, Jr., "What About Jeff?" *The Washington Post*, Apr. 16, 1996, p. C1. Further, since 1974, expenditure on special education has tripled in many school districts. There are reports that the public schools in surrounding counties of the Washington, DC, metropolitan area—Fairfax County, Virginia; Montgomery County, Maryland; and Prince Georges County, Maryland—will spend "a total of almost $50 million this year [1996] to teach, house and feed about 1,800 disabled students in private facilities, an average of almost $28,000 a child." Ibid.

[357] *See* chap. 2, pp. 37–38 for a discussion of the relative cost of educating students with disabilities.

Congress sought to address the cost issue in the IDEA Amendments of 1997.[359] Prior to the enactment of this legislation, the IDEA Part B operated under a funding formula based on a "flat" reimbursement—an equal amount was provided for each student enrolled in special education regardless of the type, cost, or duration of services. Despite congressional authorization to fund the excess costs of special education and related services up to 40 percent, Federal funding for the IDEA never approached that level.[360] With the enactment of the IDEA Amendments of 1997, Congress changed the IDEA's funding formula to remove the direct relationship that existed previously between the amount of Federal funding received under Part B of the IDEA and the number of students placed in special education. The new law retains the child count-based formula used under the IDEA of 1990 until the appropriation for Part B of the IDEA reaches $4,924,672,200.[361] This threshold will trigger a change in the funding formula for distributing funds to States. Yearly child counts based on disability no longer will determine a State's funding allotment.

The change to the new formula will be triggered once Federal funding reaches the targeted threshold of approximately $4.9 billion. However, fiscal year 1997 appropriations for the IDEA Part B Grants to States program (approximately $3.1 billion) fall far short of the threshold. Given the current climate of budget cutting, it does not seem likely that the $4.9 billion threshold appropriation level will be reached anytime soon. Furthermore, when it does take effect, it only will be amounts above this threshold that will be allocated according to the new funding formula. Thus, although the change in the funding formula may have beneficial results, it probably will not reach children in schools in the near future.

The dilemma for public school systems facing increased costs for special education and limited financial resources has prompted several debates and concerns. It has led to characterizations and criticisms of the IDEA as an unfunded Federal mandate.[362] It has generated concerns that the Federal Government has not provided enough funding for the education of students with disabilities,[363] and it has led to calls for increased Federal funding for the education of children and youth with disabilities.[364] The dilemma also has aroused a concern that school systems are hindered in efforts to undertake other educational initiatives. For example, there are reports that some schools are deterred from providing full support and placement for students with disabilities in the regular class because they perceive extraordinary increases in cost for regular class placements and because they consider it impossible to provide supplemental services to students with disabilities in regular classes.[365] Others, however, contend that the costs of placing students with disabilities into regular classes are not always beyond the limits of school systems. Further, in many instances, schools can develop strategies to provide supplemental aids and services in the regular class. For example, in 1979, the Association for the Severely Handicapped passed a resolution to end all separate schools for the disabled. The association found that, where special classes and resource rooms are often useful, indeed advantageous, these same services can be provided in the regular school so that there can also be a good deal of integration and inclusion."[366] Finally, as public schools have provided individualized services to students with disabilities, sometimes at extraordinary costs, there has been criticism that students with disabilities are receiving a better education than students without disabilities and that the educational services provided to nondisabled students are being compromised to do so.[367]

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[358] Ellen S. Raphael, Judith D. Singer, and Deborah Klein Walker, "Per Pupil Expenditures on Special Education in Three Metropolitan Schools Districts," *Journal of Education Finance*, vol. 11 (Summer 1985), p. 79.

[359] *See* Pub. L. No. 105–17 (1997). *See also* chap. 2, pp. 41–46.

[360] National Council on Disability, *Improving Implementation of the Individuals with Disabilities Education Act: Making America's Schools Work for All Children*, May 9, 1995, p. 164 ("As of fiscal year 1995, Congress has only appropriated a maximum of approximately 8 percent of the excess costs related to special education.") (hereafter cited as National Council on Disability, *Improving Implementation of the IDEA*).

[361] Pub. L. No. 105–17, § 611 (1997); *see also* H. Rep. No. 105–95, at 88 (1997); S. Rep. No. 105–17, at 8 (1997).

[362] *See* U.S. Advisory Commission on Intergovernmental Relations, *The Role of Federal Mandates in Intergovernmental Relations: A Preliminary ACIR Report for Public Review and Comment*, January 1996, pp. 11–12, app. 21.

[363] *See* National Council on Disability, *Improving Implementation of the IDEA*, pp. 165–66 ("An ever-present concern of consumers throughout the hearings was the need for more adequate funding of the IDEA. . . The government must make progress toward guaranteeing full funding of IDEA.").

Lack of Resources or Costs as a Defense: OCR's Enforcement Efforts

As the cost of educating students with disabilities has been a prominent subject of contemporary debate, a number of questions have been raised about compliance with section 504. One question raised has been the extent to which the section 504 regulations require recipient school districts to change existing educational programs or provide special services, particularly when there are concerns about the costs and affordability of such changes or services. One inquiry presented to OCR asked whether a reasonable accommodation standard is the standard applicable to the free appropriate public education requirement.[368] The reasonable accommodation standard is found at section 104.12 of the section 504 regulations covering employment issues. The provision specifies that a recipient of Federal financial assistance "shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee."[369] It is a cost-sensitive standard in that there is no requirement to make such accommodation if the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of the program."[370]

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[364] *See* ibid., pp. 166–68, 191. The Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools found that most respondents, 84 percent, believed the Federal Government, not the local schools, should bear the extra cost of educating students with disabilities. "Inclusion Unpopular with Public, Poll Shows," *The Special Educator*, vol. 11, iss. 5 (Sept. 29, 1995), p. 8.

[365] *See* Pete Idstein, "Swimming Against the Mainstream," *Phi Delta Kappan*, December 1993, pp. 336–40. Pete Idstein, Patricia Gizzi, Katy Ferrero, and Sue Miller, "There Are Others in the Mainstream," *Phi Delta Kappan*, May 1994, pp. 718–20.

[366] *See* Miriam A. Phelps, *Inclusion and Integration and School Climate* (1993), pp. 6–7.

[367] In the 1972 decision in *Mills v. Board of Education of the District of Columbia*, the court dismissed the District's concerns about the increased financial resources necessary to educate students with disabilities. 348 F. Supp. 866 (D.D.C. 1972). The court further noted, "If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom." 348 F. Supp. at 876. The court based its statement on the rationale that the "inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, [could] not be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child." *Id.*

[368] *See* Norma V. Cantú, Assistant Secretary for Civil Rights, DOEd, letter to Perry A. Zirkel, Professor, College of Education, Lehigh University, Aug. 28, 1993, p. 1.

[369] 34 C.F.R. § 104.12(a) (1996). Reasonable accommodation may include making facilities used by employees readily accessible

In responding to the inquiry, OCR indicated that the section 504 regulations establish different compliance standards for different educational contexts.[371] For issues relating to employment in schools, colleges, universities, and other federally assisted education programs, the recipient is bound by a reasonable accommodation standard.[372] For issues relating to postsecondary and vocational education, a recipient's compliance is based on an academic adjustments standard.[373] The standard for elementary and secondary education is based on the requirement that recipient elementary and secondary schools must provide education and related aids and services designed to meet the individual needs of students with disabilities as adequately as the needs of nondisabled students are met. It places much broader obligations on recipients, obligations that may involve substantial modifications to existing programs.[374]

Another question that has been raised about cost issues is OCR's approach to school districts that contend they lack resources or means to come into compliance with section 504 after OCR has identified areas of noncompliance. OCR has taken a strict approach to the schools' obligations under section 504. As a matter of policy and practice, OCR does not permit school districts to avoid compliance with the section 504 regulations when they contend they do not have sufficient resources to comply.[375] For example, in a recent case, a school district asserted that it could not find any occupational therapists to serve the district, and OCR rejected the district's defense that it used its "best efforts" to comply with OCR's directive.[376] In at least one case, however, OCR has seemed to have accepted a "best efforts" argument by a school district. In that case, OCR noted that it historically had required a school district to use services of a bilingual psychologist, fluent in the student's primary language, when evaluating a student who is suspected of needing special education or related aids and services. OCR also noted: "This requirement was and is continuing to

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to and usable by persons with disabilities, and job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions. *Id.* § 104.12(b).

[370] *Id.*

[371] Norma V. Cantú, Assistant Secretary for Civil Rights, DOEd, letter to Perry A. Zirkel, Professor, College of Education, Lehigh University, Aug. 28, 1993, p. 2.

[372] *See* 34 C.F.R. § 104.12 (1996).

[373] Under this standard, recipients have an obligation to modify their academic requirements as necessary to ensure that they do not discriminate or have the effect of discriminating, on the basis of disability, against a qualified applicant or student with a disability. If a recipient can demonstrate that an academic requirement is essential to the program of instruction being pursued by the applicant or student or to any directly related licensing requirement, the academic requirement is not regarded a discriminatory. *See* 34 C.F.R. § 104.44(a) (1996); Norma V. Cantú, Assistant Secretary for Civil Rights, DOEd, letter to Perry A. Zirkel, Professor, College of Education, Lehigh University, Aug. 28, 1993, p. 2. The type of modifications necessary to meet this standard may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted. 34 C.F.R. § 104.44(a) (1996).

[374] According to OCR, "[b]y meeting the educational needs of children with disabilities as adequately as it meets the needs of other children, the school district is eliminating discrimination, and *even substantial modifications* required to bring about this result are not suspect. . ." Norma V. Cantú, Assistant Secretary for Civil Rights, DOEd, letter to Perry A. Zirkel, Professor, College of Education, Lehigh University, Aug. 28, 1993, p. 3 (clarifying the implications of *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), on the analysis for discrimination in elementary and secondary education and the requirement for a free appropriate public education at 34 C.F.R. §§ 104.4, 104.33(b)) (emphasis added).

[375] Peelen interview, p. 6.

[376] Ibid.

be enforced in geographical areas where such personnel are available. . . . Results of the current investigation indicate that at present [Spanish-speaking bilingual] psychologists are not available in several areas of Southern California on a fulltime basis, and are in short supply for part-time work. If the District honors the commitments [that (1) it will continue to utilize the services of a bilingual psychologist for assessments of Hispanic LEP students wherever possible and (2) where this is not possible, it will assign priority for students, whose assessment results are most substantially and materially affected by lack of English proficiency, for assessment by a Spanish-speaking bilingual psychologist to the extent that the services are available to the District], including efforts to seek the services of a bilingual Spanish-speaking psychologist on a full-time or part-time basis, the evaluation procedure is in compliance with the requirements enforced by OCR."[377]

At the remedies stage, OCR has attempted to assist school districts in locating free or inexpensive resources or by providing technical assistance.[378] For example, cost often has been an issue in smaller rural school districts when providing students having disabilities with adequately trained teachers. In some cases, these school districts have also faced difficulties attracting adequately trained special and general education teaching staff.[379] In one case where OCR found that a school district did not have sufficient certified teachers for students with disabilities, it assisted the school district in developing a training program. Since the State allowed teachers to obtain the appropriate courses for certification while on the job, OCR encouraged the school district to identify some of the experienced teachers in the district to work with, mentor, and train the less experienced teachers.[380]

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[377] John E. Palomino, Regional Civil Rights Director, OCR, Region IX, DOEd, letter to Maurice Ross, Superintendent, Tustin Unified School District, Tustin, CA, re: Complaint No. 09-90-1079, May 31, 1990, 16 EHLR 1335, 1336–37.

[378] Peelen interview, p. 6. *See also* Judy Stover, Equal Opportunity Specialist, and Catherine Edwards, Staff Attorney, OCR, Region III, DOEd, telephone interview, June 18, 1996, p. 7 ("We do not accept [] as an excuse [that a school district does not have the resources to comply]. We work with the schools to make sure they come into compliance. We can try to help with technical assistance . . .").

[379] *See* Lee Nell, Chief Regional Attorney, OCR, Region III, DOEd, telephone interview, June 11, 1996, p. 14.

[380] Ibid., p. 14.

Chapter 9

Eliminating Barriers, Providing Access, and Maximizing Student Potential

Introduction

Some of the problems long recognized as denying students with mental retardation, learning disabilities, behavioral disabilities, and serious emotional disturbance equal educational opportunities have been the lack of access to available subjects, activities, and services offered in school and the stereotyping of students with these disabilities as having limited abilities or limited potential. Concerns about these problems prompted Congress and the U.S. Department of Education to include provisions in the IDEA, its implementing regulations, and section 504 regulations to address the problems. Congress and the U.S. Department of Education recognized the importance of eliminating barriers for students with disabilities by incorporating pertinent provisions into section 504 and the IDEA. These provisions promote access to all subjects, activities, and career opportunities for students with disabilities. For example, section 504 regulations prohibit a school system from "deny[ing] a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service."[1]

Eliminating Barriers—Labeling

Background

Labeling has been defined as "classifying or categorizing children on the basis of their disability."[2] As such, labeling is a neutral term referring to the educational practice of classifying students with disabilities according to their specific disability. However, considerable debate surrounds the use of labeling and its potential effects on students with disabilities. The same source that defined labeling using the neutral terms above also indicated that labeling is "disfavored because of the perceived misuse and stigmatizing effect."[3] Thus, the term labeling has taken on a pejorative tone. As used in this report, however, the term is used as defined above.

Labeling is one of the major issues that has arisen relating to the elimination of barriers for students with disabilities. Past practices in schools and current provisions in the IDEA's Part B funding formula have been criticized as encouraging the labeling of students. For example, labeling was of great concern to advocates and legislators who supported enactment of section 504 and the IDEA. Robert T. Stafford, a former Senator who led the effort to enact the Education of All Handicapped Children Act in 1975, wrote of two "invisibilities" endured by children and youth with disabilities:

> [First,] the gross invisibility of literally being hidden away from the rest of us, and, second, the more subtle and perhaps more destructive invisibility of being in fact "seen," but "seen" by an inner eye that perceives a label rather than a unique person. An eye which does not see Johnny or Susie, but instead, sees "crippled," or "retarded," or "maladjusted." And doubt it not, this two-tiered invisibility has been bred in the schoolhouses of America as much as in any other of the Nation's institutions.[4]

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[1] 34 C.F.R. § 104.4(b)(1)(i) (1996).

[2] Susan Gorn, ed., *Special Education Dictionary* (Horsham, PA: LRP Publications, 1997), p. 157.

[3] Ibid.

More recently, in 1995, the National Council on Disability issued a report citing a number of concerns about labeling. According to the report, many parents of children with disabilities fear that the process of labeling a child will lower schools' expectations of the child and result in the child's educational opportunities being limited.[5] Although the report indicated that most parents had concerns about the stigmatizing effects of labels, it also found that most parents of students with disabilities were reluctant to give up labeling altogether, because many believed that without labeling their children might not receive the special educational support they need.[6]

According to the Council for Exceptional Children's Digest of State and Federal Laws, most State laws require school districts to label children before the State will reimburse the school districts for providing services.[7] However, at least one State eliminated the labeling requirement because such classification "had a stigmatizing effect."[8] Moreover, there has been increasing support for noncategorical systems of special education due, in part, to concerns about the effects of labeling on students.[9]

> After 20 years of successful implementation of a noncategorical system of special education in Massachusetts, we wholeheartedly support such an approach. It facilitates meaningful inclusion in the regular classrooms, and it does reduce stigma. It almost forces reliance on individualized planning, a true IEP. It also recognizes that children differ more within categories than between categories and that their educational needs are often not label-linked.[10]

Despite this support, most States have retained the label requirement as a precondition for reimbursement. There have been some efforts to address the labeling issue. For example, some States have changed the way they identify students as eligible for special education. "Noncategorical" States identify students by service need instead of disability classification. The findings in at least one study, however, question whether this change in the identification process successfully deters or prevents labeling.[11]

Impact of Labeling on Students

Educational literature reveals that labeling can have both positive and negative effects on students. The potential negative aspects of labeling include: (1) possibility of stigmatization, rejection by peers, and differential treatment;[12]

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[4] Robert T. Stafford, "Education for the Handicapped: A Senator's Perspective," *Vermont Law Review*, vol. 3 (1978), p. 72.

[5] *See* National Council on Disability, *Improving the Implementation of the Individuals with Disabilities Education Act: Making America's Schools Work for All Children*, May 9, 1995, p. 31 ("In many school districts, an automatic equation has developed between the assignment of a disability label, the assumption that this label is, essentially, life-defining, the lowering of expectations, and the placement of students with similar labels with other students 'of their own kind.'").

[6] *See* ibid., p. 33. The report cited a witness as cautioning "that school districts might interpret a reduced emphasis on categorically driven services to mean that they no longer need to provide necessary supports and services to students with special needs." Ibid.

[7] *See* Rebecca W. Goldman, "A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act," *Dayton Law Review*, vol. 20 (1994), p. 276.

[8] *See* ibid.

[9] *See* National Council on Disability, *Improving the Implementation of IDEA*, p. 31.

[10] Ibid. (statement of Martha Ziegler who attended the Boston, MA, field hearing).

[11] *See* Beth Harry, Norma Allen, and Margaret McLaughlin, "Communication Versus Compliance: African-American Parents' Involvement in Special Education," *Exceptional Children*, vol. 61 (February 1995), p. 364 (hereafter cited as Harry et al., "Communication Versus Compliance"). The 3-year study, which looked at African American parents' involvement in special education, found that a common theme among parents was concern over the stigma of labeling. Harry, Allen, and McLaughlin note, "This is rather ironic, because the state in which the study was conducted is a noncategorical state that identifies students by service need rather than by disability classification." Ibid.

(2) lowered expectations of the student;[13] (3) low self-esteem;[14] and (4) irrelevance of the labels to the student's instructional needs.[15] Furthermore, disability advocates fear that the high costs of assessment to assign labels may lead to a decreased willingness on the part of general education to meet the diverse needs of all students.[16] In contrast, some of the positive aspects of labeling include: (1) facilitating communication among professionals;[17] assisting in obtaining funding for special education services;[18] and matching instructional approaches to instructional needs.

One author has summarized the potential negatives of labeling as follows:

> One of the main concerns is that there are swift and often irreparable effects of the continued use of labels for students with disabilities. For example, a student having difficulties in school may be labeled a "mentally retarded" student, a "learning disabled" student, or an "emotionally disturbed" student. Those who interact with the student then may have trouble seeing a person first; instead, they see the disability and "all the stereotypes associated with the status." The disability label and associated stereotypes can result in a single-minded approach to the education of the student, without regard to the whole individual. The label emphasizes a single attribute of a person and detracts from other attributes. Labels and simplistic stereotypes can create a negative and devalued identity for the person by members of his or her community. Labels can also become part of the common culture and can be used in a pejorative manner. . . .
>
> Numerous authors have suggested that labels provide an excuse for school systems who fail diverse student populations by placing the blame for "failure" on the students. In addition, disability labels can imply a permanent deficit within an individual. If educators focus on these deficits and assume their permanence, expectations for a student may be lowered.[19]

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[12] *See, e.g.*, Daniel P. Hallahan and James M. Kauffman, *Exceptional Learners: Introduction to Special Education* (Boston: Allyn Bacon, 1997), p. 52–54 (hereafter cited as Hallahan and Kauffman, *Exceptional Learners)*; Donald S. Marozas and Deborah C. May, *Issues and Practices in Special Education* (New York: Longman, 1988), pp. 164–65 (hereafter cited as Marozas and May, *Issues and Practices in Special Education*). However, research is mixed. Although labels appear to make people view children with disabilities differently, they also make people more tolerant of these children. Ibid.

[13] Gartner and Lipsky contend that society tends to view students labeled as disabled as incapacitated or crippled and hence to have lower expectations regarding those students' academic achievement. Disability labels cause students with disabilities "to be excused from standards and tests routinely applied to other students; to be allowed grades that they have not earned. . . ." Further, the low expectations of students with disabilities, rooted in current special educational practices, leaves students with disabilities and their parents with little, if any, control. "The end result is more control for the caregivers and less control for the person being cared for. Having denied individuals with disabilities autonomy and decisionmaking authority—in effect denying them the respect given to people whom society respects—we then excuse their behavior ascribing it to the disability." Alan Gartner and Dorothy Kerzner Lipsky, "Beyond Special Education: Toward a Quality System for All Students," *Harvard Educational Review*, vol. 57, no. 4 (November 1987), p. 381. *See also* Dorothy Kerzner Lipsky and Alan Gartner, "Building the Future," in Dorothy Kerzner Lipsky and Alan Gartner, eds., *Beyond Separate Education: Quality Education for All* (Baltimore, MD: Paul H. Brookes Publishers, 1989), p. 276.

[14] *See* Peggy Albinger, "Stories from the Resource Room: Piano Lessons, Imaginary Illness, and Broken-Down Cars," in Mary S. Poplin and Patricia Tefft Cousin, eds., *Alternative Views of Learning Disabilities: Issues for the 21st Century* (Austin, TX: Proed, 1996), p. 367. However, others contend that labels allow children with disabilities to see themselves positively, and research on the effect of labels on children's self concept has mixed results. *See* Marozas and May, *Issues and Practices in Special Education*, pp. 164–66.

[15] Lipsky and Gartner, "Building the Future," p. 276.

[16] Ibid., p. 276.

[17] Hallahan and Kauffman, *Exceptional Learners*, p. 54; Marozas and May, *Issues and Practices in Special Education*, p. 164.

[18] Hallahan and Kauffman, *Exceptional Learners*, p. 54; Marozas and May, *Issues and Practices in Special Education*, p. 163.

[19] Mary A. Falvey et al., "Services for Students with Disabilities: Past and Present," in Mary A. Falvey, ed., *Inclusive and Heterogeneous Schooling: Assessment, Curriculum, and Instruction* (Baltimore, MD: Paul H. Brooks Publishing, 1995), pp. 24–25 (citations omitted).

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However, another author has noted that research does not show consistently that labeling lowers teachers' expectations, "labels do provide some *general* idea of the needs of the student," and facilitate Federal funding of special education.[20]

Researchers have examined how labels affect students with certain disabilities. Labels can create negative feelings toward and reactions to the children in special education and their parents by health professionals, teachers and other school officials, and nondisabled children.[21] For example, the tendency of children without disabilities to "label" children with disabilities negatively is enhanced with school-accepted educational labeling systems.[22] The immediate impact of labels on many children is that they have low-self esteem, do not succeed or achieve in the school environment, and can learn to be "cozy in the category of special education," and accept less than what they could be.[23]

The classification or labeling of students with disabilities may have a far-reaching impact on them, beyond their experiences as students in the public school system.[24] Labeling has the potential effect of permanent, negative stigmatization lasting into adulthood.[25] The labeling of children with special needs not only may stigmatize or affect the self-esteem of children with disabilities and their parents,[26] labeling also can have adverse effects on communication among parents and students, researchers, and practitioners.[27] A given label may have different meanings for different people. Two researchers report that for special educators and researchers to communicate effectively there is a need to develop knowledge of "instructionally relevant characteristics" of those children who have special needs, and then to develop and implement "instructional practices" that address the differences in the characteristics.[28] They argue that a "common language" of classification of students would facilitate communication between researchers and practitioners.[29]

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[20] Ronald L. Taylor, Les Sternberg, and Stephen B. Richards, *Exceptional Children: Integrating Research and Teaching* (San Diego, CA: Singular Publishing, 1995), p. 23.

[21] Bill R. Gearheart, *Special Education for the '80s* (St. Louis, MO: C.V. Mosby, 1980), p. 69; Kirby A. Heller, Wayne H. Holtzman and Samuel Messick, *Placing Children in Special Education: A Strategy for Equity* (Washington, DC: National Academy Press, 1982), p. 284 (hereafter cited as Heller et al., *Placing Children in Special Education)*; Michael J. Smith and Angela Shen Ryan, "Chinese-American Families of Children With Developmental Disabilities: An Exploratory Study of Reactions to Service Providers," *Mental Retardation*, vol. 25, no. 6 (December 1987), p. 350; Beth Harry, *Cultural Diversity, Families, and the Special Education System: Communication and Empowerment* (NY: Teachers College Press, 1992), p. 245 (hereafter cited as Harry, *Cultural Diversity*). This researcher studied the effect of labeling on one student. The article quotes the student as stating:
"My counselor and LD teacher advised me not to go to college; in fact they went so far as to tell my parents not to let me go. They wanted me to go to a junior college or a vocational school. I knew my strengths and weaknesses, and I also knew I could make it through college, if I got the chance. But that chance was hard to get."
See Colleen M. Fairbanks, "Labels, Literacy, and Enabling Learning: Glenn's Story," *Harvard Educational Review*, vol. 62, no. 4, Winter 1992, p. 476 (hereafter cited as "Labels, Literacy, and Enabling Learning").

[22] Gearheart, *Special Education for the '80s*, p. 69; Heller et al., *Placing Children in Special Education*, pp. 278–83. *See also* J.M. Foley, "Effect of Labeling and Teacher Behaviors on Children's Attitudes," *American Journal of Mental Deficiency*, vol. 83 (1979), pp. 380–84; Fairbanks, "Labels, Literacy, and Enabling Learning," p. 484.

[23] *See* Lipsky and Gartner, *Beyond Separate Education*, p. 13; Fairbanks, "Labels, Literacy, and Enabling Learning," pp. 476–78, 484.

[24] As one researcher states, "the power of the school is such that to be stigmatized as a student is to be stigmatized as a whole person." Harry, *Cultural Diversity*, p. 246. *See also* Fairbanks, "Labels, Literacy, and Enabling Learning," p. 476 (quoting a student's perspective, "I wanted to go to college, but I didn't think I could get in if I were in LD classes. So I worked hard and by my senior year, I was out of all LD classes, but the label stayed with me. I guess that's here to stay.").

[25] Gearheart, *Special Education for the '80s*, pp. 69, 72.

[26] *See* Harry, *Cultural Diversity*, p. 245; Fairbanks, "Labels, Literacy. and Enabling Learning," pp. 484–85; Festus E. Obiakor, "Self-Concept of African-American Students: An Operational Model for Special Education; Issues in the Education of African-American Youth in Special Education Settings," vol. 59, no. 2 (1992), p. 60 (hereafter cited as Obiakor, "Self-Concept of African-American Students").

[27] *See* Margaret C. Wang, "Adaptive Instruction: An Alternative for Accommodating Student Diversity through the Curriculum," in Lipsky and Gartner, *Beyond Separate Education*, p. 106.

When there is poor communication among specialists, parents, and students, "mislabeling" is likely to occur.[30] However, communication among educators, parents, and students is difficult because of the discretionary labeling of children.[31] As one author states, "[I]t is typical of special education research, for example, to describe subjects simply by using the categorical labels used in the schools. . . . [T]he definitions and uses of such categorical labels have been shown to be so variable and scientifically questionable as to make communication very difficult."[32]

In addition to these potential negative effects of labeling, the scientific and educational underpinnings of labeling are questionable. In summarizing the research on this issue, one author has stated that:

> Current classification systems for disability labels are plagued with problems, as indicated by disagreement among professionals and demographic variation in identification practices. These problems include difficulties with the reliability and validity of fitting individuals into disability categories. In addition, the existence of disability labels and the assignment of those labels to individuals are as much sociocultural phenomena as medical, biologically based, or organized phenomena. The process of giving an individual a disability label is affected by social values, cultural belief systems, and political forces as much as any objective reality about that individual.[33]

Many researchers and disability advocates have criticized labeling as being a subjective process with little scientific foundation.[34] They argue that whether or not a student receives appropriate accomodations, the "disabled" label ends up being arbitrary rather than being based on sound scientific and educational criteria. For instance, some authors have argued that decisions on how and whether students should be labeled in special education have been based on such criteria as sex; socioeconomic status; physical appearances; availability of funds, personnel and space for services; professionals' and teachers' personal perceptions of certain students; and parents' roles or power in school systems.[35] Students may be labeled merely because their learning style or classroom behavior does not conform to schools' expectations of normal students. As one researcher states, "Historically, the special education placements have been made essentially by a kind of de-selection process. Children have been placed in special education not because of evidence that it will enhance their lives, but simply because it is difficult to serve or 'tolerate' them in regular education."[36] Another researcher states, "We embrace definitions of learning disabilities and their attendant interventions, because we feel compelled to label those students whose performance is more eccentric than others. Our school systems also are tied to the belief that students, regardless of their age or experience, must begin with 'basic skills.'"[37]

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[28] Ibid., p. 106.

[29] Richard L. Allington and Anne McGill-Franzen, "Different Programs, Indifferent Instruction," in Lipsky and Gartner, *Beyond Separate Education*, p. 86.

[30] Arlene L. Barry, "What's In a Name?", *Reading Horizons*, vol. 34, no. 1, 1993, p. 3; Wang et al., "Serving Students at the Margins," p. 13.

[31] Fairbanks, "Labels, Literacy, and Enabling Learning," p. 483. The researcher states that parents often do not understand the technical descriptions of their children's learning, and relied on school personnel to determine the direction of their children's education. *See also* Smith and Ryan, "Chinese-American Families," pp. 347–50.

[32] Wang, "Adaptive Instruction," p. 106.

[33] Falvey et al., "Services for Students with Disabilities," p. 25.

[34] *See* Barry, "What's In A Name?" pp. 4–11, for a historical discussion on the issue.

[35] *See* Margaret C. Wang and Herbert J. Walberg, "Four Fallacies of Segregationism," *Exceptional Children*, vol. 55, no. 2 (1988) p. 128 (hereafter cited as Wang and Walberg, "Four Fallacies of Segregationism"); W. Otto, "Ysseldyke and Algozzine—Those Two Guys are Friends of Mine," *Journal of Reading*, vol. 29 (1986), pp. 572–75, as cited in Barry, "What's In A Name?" p. 11; Mary G. Anderson, "The Use of Selected Theater Rehearsal Technique Activities with African-American Adolescents Labeled "Behavior Disordered'; Issues in the Education of African-American Youth in Special Education Settings," *Exceptional Children*, vol. 59, no. 2 (October 1992), p. 132 (stating that teachers may label African American students as behavior disordered because they disapprove of their use of Black English or exhibit behavior that does not

In particular, researchers have disparaged the use of the label "learning disabled" as not being able to distinguish between students with disabilities and students who are slow in school. The label "learning disabled" not only may describe a student's actual skills and deficits inaccurately, but also may reflect "serious conceptual and practical problems" with the current system or method of classifying or labeling children.[38] Authors have charged that the term "learning disabled" is used to characterize a large number of children who happen to be unsuccessful in school.[39] Researchers have questioned whether there is a basis for labeling such a large number of students (nearly 2 million students in 1987) as learning disabled.[40] They argue that much of the labeling is unjustified and unwarranted.[41]

In addition to criticizing labeling as subjective and often inaccurate, critics of labeling question whether labeling is "instructionally valid" or useful.[42] A number of researchers maintain that the

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conform to teachers' cultural notions about how children should behave).

See also Obiakor, "Self-Concept of African-American Students," p. 160. This researcher states that historically, African American students have endured "negative labels" in school programs that are counterproductive to learning. To address these problems, he suggests that special educators must focus more clearly on issues related to self-concept and examine other factors and instruments to diagnose and interpret the needs of these students.

[36] Wang and Walberg, "Four Fallacies of Segregationism," p. 128.

[37] Fairbanks, "Labels, Literacy, and Enabling Learning," 476–77.

[38] Jenifer Goldman and Howard Gardner, "Multiple Paths to Educational Effectiveness," in Lipsky and Gartner, *Beyond Separate Education*, p. 122. Another study reports that the "learning disability" label is often applied to children whose difficulties are a reflection of a normal second language. *See* A.A. Ortiz and E. Polyzoi, eds., *Characteristics of Limited English Proficient Hispanic Students in Programs for the Learning Disabled: Implications for Policy, Practice and Research, Part 1, Report Summary* (Austin, TX: University of Texas, 1986) (ERIC Document Reproduction Service No. ED 2676578) as cited in Beth Harry, "Making Sense of Disability: Low-Income Puerto Rican Parents' Theories of the Problem," Exceptional Children, vol. 59, no. 1 (September 1992), p. 27 (hereafter cited as Harry, "Making Sense of Disability").

[39] Goldman and Gardner, "Multiple Paths to Educational Effectiveness," p. 122.

[40] One hypothesis is that students identified as learning disabled suffer from an undetermined neurological source that causes the condition. Alternatively, learning disabilities may have psychological or social causes, such as ill-treatment within the home that cause the child's learning or academic problems. Researchers question the fact that millions of children are classified or labeled learning disabled. *See* T. Armstrong, *In Their Own Way* (Los Angeles, CA: Jeremy P. Tarcher, Inc., 1987), G. Coles, *The Learning Mystique* (NY: Pantheon Books, 1988), J. Ysseldyke and B. Algozzine, "LD or Not LD: That's Not the Question!" *Journal of Learning Disabilities*, vol. 16 (1983), pp. 29–31, J. Ysseldyke, B. Algozzine, L. Richey and J. Graden, "Declaring Students Eligible for LD Services: Why Bother with the Data?" *Learning Disabilities Quarterly*, vol. 5 (1982), pp. 37–44, J. Ysseldyke, M. Thurlow, J. Graden, C. Wesson, B. Algozzine and S. Deno, "Generalizations from Five Years of Research on Assessment and Decision-making," *Exceptional Education Quarterly*, vol. 4 (1983), pp. 75–93 as cited in Lipsky and Gartner, *Beyond Separate Education*, p. 122.

[41] *See* Dorothy Kerzner Lipsky and Alan Gartner, "The Current Situation," in Lipsky and Gartner, *Beyond Separate Education*, pp. 13–14 and Goldman and Gardner, "Multiple Paths to Educational Effectiveness," p. 122.

[42] *See* Joseph R. Jenkins, Constance G. Pious, David L. Peterson, "Categorical Programs for Remedial and Handicapped Students: Issues of Validity," *Exceptional Children*, vol. 55, no. 2 (1988), pp. 147–58; Falvey et al., "Services for Students with Disabilities," p. 26.

educational interventions needed by children with learning disabilities and children with mental retardation are identical.[43] If such is the case, they argue, there is no reason to distinguish different types of children with disabilities by giving them different labels. Children should not receive specific labels such as "learning disabled," but instead be given a general designation as a child in need of special education.[44]

Impact of Labeling on Parents

For parents, labeling also can become an acceptable excuse for their children's lack of success in school. In other words, it can provide them with "solace" for the underachievement of their children.[45] One study reports that parents are influenced by labels, particularly those they perceive as "negative."[46] When the label is considered to be negative, the parents tend to underestimate their children's self-concept.[47] Another study found that parents were both "relieved and frustrated by the process of labeling." They were relieved because they finally had an explanation for their children's poor performance in school.[48]

Many parents are associated with their children's disabilities and can be labeled the same way as their children who have the disabilities. Thus, the "damaging consequences of labeling for the child are extended to the parents as well."[49] According to one researcher:

> The problem is not only that parents are labeled; the same model of pathology that is used in describing the child with a disability is applied to the parents as well. Just as the handicaps that the child faces are ascribed solely to the impairment, not to the societal response, the parents' reactions are also seen . . . [as] a melange of shock, sorrow, denial, and rejection. The parents' reactions are never viewed as rational responses to the burdens imposed by inadequate services, the insults of professional ignorance or the lack of social and economic supports.[50]

Many parents are accused of living in denial when their children are labeled with a disability, when the parental response may, in fact, be a difference of opinion with educators and professionals.[51] One researcher states:

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[43] *See* Heller et al., *Placing Children in Special Education*, p. 86; Joseph R. Jenkins, Constance G. Pious, David L. Peterson, "Categorical Programs for Remedial and Handicapped Students: Issues of Validity," *Exceptional Children*, vol. 55, no. 2 (1988), pp. 147–58.
Some researchers indicate that students termed "at risk," who are eligible for compensatory education, also need educational interventions that are similar to those needed by students with learning disabilities and students with mental retardation. *See* Gaea Leinhardt, William Bickel, Allan Pallay, "Unlabeled But Still Entitled: Toward More Effective Remediation," *Teachers College Record*, vol. 84, no. 2 (Winter 1982).

[44] *See* Heller et al., *Placing Children in Special Education*, p. 86 (We can find little empirical justification for categorical labeling that distinguishes children with mild mental retardation from other children with academic difficulties, such as LD children or children receiving compensatory education.); Joseph R. Jenkins, Constance G. Pious, David L. Peterson, "Categorical Programs for Remedial and Handicapped Students: Issues of Validity," *Exceptional Children*, vol. 55, no. 2 (1988), pp. 147–58; and Gaea Leinhardt, William Bickel, Allan Pallay, "Unlabeled But Still Entitled: Toward More Effective Remediation," *Teachers College Record*, vol. 84, no. 2 (Winter 1982).

[45] J.G. Carrier, *Learning Disability: Social Class and the Construction of Inequality in American Education* (Westport, CT: Greenwood Press, 1986) as cited in Lipsky and Gartner, *Beyond Separate Education*, p. 13.

[46] Harry, "Making Sense of Disability," p. 27.

[47] Ibid.

[48] Fairbanks, "Labels, Literacy, and Enabling Learning," p. 483.

[49] Lipsky and Gartner, *Beyond Separate Education*, p. 160.

[50] Dorothy Lipsky, "The Roles of Parents," in Lipsky and Gartner, *Beyond Separate Education*, p. 160. *See also* Lipsky and Gartner, *Beyond Separate Education*, p. 160.

[51] *See* Lipsky and Gartner, *Beyond Separate Education*, pp. 160–61. *See also* Harry, "Making Sense of Disability," p. 27.

> Parental rejection of labels for their children underscores the highly differentiated response of individuals to their loved ones, whom they see as individuals with behaviors that may be recognizably different, but which do not necessarily render the whole individual 'deviant' and therefore warrant a deviant classification. Thus, when professionals say that parents do not accept a child's classification, it should not be assumed that the professional is right and the parent wrong, but that both are using different criteria for describing the child. It would be more appropriate to describe the parent as disagreeing with the label than as failing to accept it.[52]

A 1987 study reported the confusion and lack of understanding experienced by 59 Asian American parents whose children were labeled as having a "developmental disability."[53] Much of the confusion was the result of the language difficulty; however, the parents expressed many feelings stemming from cultural and familial interpretations of disability:

> Parents were asked to describe their feelings about the whole diagnostic process at the initial diagnosis. They expressed a very wide range of emotion. . . . The most prevalent feelings were confusion, anger, guilt, shame, and being upset, overwhelmed, heart-broken, sorry, depressed, helpless, worried, and embarrassed. In addition, their lack of understanding of why their children were disabled was evident.[54]

A 1992 article summarized research on the impact of labeling on parents. The parents' concerns centered on "conflicting interpretations of the concept of disability and on parents' alternative explanations for their children's learning difficulties."[55] The researcher found that the parents' explanations of their children's difficulties were very much in line with the current debates and arguments in special education concerning labeling.[56] The study discusses the reactions of parents to certain labels assigned to their children. The findings further support other research which found that parents tend to be confused about the classification process, and more accepting of some labels than others.[57]

Few studies on minority parents' views of labels exist. One such study states that many of these parents reject a "global definition" of their children that is based on only a part of their identities.[58] Their parameters of what is normal and acceptable in the child tends to be much broader than those labels used at schools.[59] Other research finds that African American and Hispanic parents dispute the appropriateness of the label for their children.[60] For the most part, research finds that minority parents tend to be more concerned about the overclassification and special education placement of their children; as well as the "stigma" in labeling; and a perceived need to hide disabilities from family members once their children are labeled as having disabilities; and protect the children from the "stigma" of being labeled.[61]

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[52] Harry, "Making Sense of Disability," p. 27.

[53] Smith and Ryan, "Chinese-American Families," pp. 345–50.

[54] Ibid., p. 348.

[55] Harry, "Making Sense of Disability," p. 27.

[56] Ibid.

[57] Minimal research has been on parents' reactions to certain labels. For example, some parents have shown to be more accepting of terms or labels such as brain injured than of the retardation-related labels. They perceive some labels to be less stigmatizing to the child. They tend to reject "mental retardation" labels, even though they may agree with the professionals' analysis and classification, and recognize their children's difficulties. However, they preferred to have a different label or one less descriptive, such as "developmentally delayed." *See* Harry, "Making Sense of Disability," p. 27. *See also* Harry et al., "Communication versus Compliance," p. 364.

[58] Harry, *Cultural Diversity*, p. 245.

[59] Ibid.

[60] *See, e.g.*, Harry, "Making Sense of Disability," p. 27.

A 1992 study examined Hispanic parents' reactions to their children's classification or labeling in special education programs.[62] Although the sample is small, the data showed that different designations or labels led to parents' confusion of terms, particularly the terms handicapped and retarded.[63] The researcher explains, "[T]he word 'retardado' was tied to the general category of mental illness—a tremendously stigmatized form of social deviance," and adds, "For parents to accept the use of the word retarded they had to start by differentiating it from the word loco/crazy, and most parents who made this transition substituted the word [with] slow.[64] She cites a Puerto Rican parent as saying, "For me, retarded is crazy; . . . 'handicap' means a person who is incapacitated, like mentally, or missing a leg . . . a person who is [an] invalid, useless. . ." Some parents "modified" the term or label "retarded," while others rejected it. The parents felt that the schools' labeling processes did not recognize their children's individuality or their family/cultural identity.[65]

Eliminating Barriers Associated with the Negative Effects of Labeling

Although some form of child classification may be necessary if special education services are to be received, there is very little research that supports continuing the existing classification or placement labeling system.[66] As a result, some experts and disability advocates suggest replacing the current system, which labels children by disability with a system that labels children by the type of instruction needed by each child.[67]

One author stresses that with the rapidly increasing cultural diversity in our society, further consideration in education should be given to the potential impact of crosscultural misunderstanding in the labeling of special education students.[68] She calls for a labeling system that reflects the programmatic needs of students or that relies on curriculum-based approaches rather than categorical diagnosis.[69] Still another researcher recommends that educators in special education need to teach rather than label students.[70] She also recommends that services for students should be based on need, rather than on a category of assistance or whether or not a student fits a label.[71] However, if labels have to be used, this researcher suggests that one solution to the problem would be for educators and others involved in special education to develop a "standardization" of the labeling process.[72]

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[61] *See* ibid.; Harry et al., "Communication versus Compliance," p. 364. *See also* Smith and Ryan, "Chinese-American Families," p. 348. In this study, the parents expressed feelings such as they thought that this was the fate of their child, that they did not understand why the child was disabled because they are "honest" people, that other family members would blame the parent for having a "problem" child, and accusations from family members that the mother did not bring the child up properly. Ibid.

[62] Harry, "Making Sense of Disability," p. 27.

[63] Participants were 12 Puerto Rican families residing in a low-income, largely Hispanic community. The families represented 17 children in special education programs, which was 35 percent of the 48 Puerto Rican students enrolled in special education in the school district. Six of the children were classified as mentally retarded, and 11 as learning disabled. Ibid.

[64] Ibid.

[65] Ibid.

[66] *See* Heller et al., *Placing Children in Special Education*, pp. 85–87. But *see* James M. Kaufmann, *Characteristics of Behavior Disorders of Children and Youth*, 4th ed. (Columbus, OH: Merrill Publishing, 1977, p. 135 ("Although classification of disordered behavior carriers the risk that individuals will be needlessly stigmatized by labels for their differences, it would be foolish to abandon the task of classifying people's problems. Giving up all uses of classification is tantamount to abandoning the scientific study of social and behavioral difficulties. Indeed, we need labels for problems to communicate about them. . . .").

[67] *See* David P. Prasse, "Legal Influence and Educational Policy in Special Education," *Exceptional Children*, vol. 54, no. 4 (January 1988), p. 302.

[68] Harry, "Making Sense of Disability," p. 27.

[69] Ibid.

Three researchers support a shift of the use of labels from students to programs.[73] Their position is that such a shift would reduce the incidence of mislabeling, and encourage educators to use diagnostic procedures rather than labels on children to provide learning techniques for children.[74] At least one researcher writes that proposed changes in classification and definitions could initiate changes in other special education areas, such as university training programs, State certification requirements and service delivery systems, which are all established and implemented around existing labels and classifications of students.[75]

If children are labeled, however, "labeling must be approached with full understanding of potentially negative effects."[76] Educators must be aware of the limitations of techniques and assessment tools that create mislabels, especially for racial and ethnic minority and language minority students, and the potential for the stigmatizing of the students way beyond their educational years.[77] The researcher does not advocate eliminating the use of labels. For example, he notes that to provide certain services and funding, there needs to be "commonly recognized terminology."[78] However, the use of labels warrants a full understanding of the factors that make it effective to those children who need special services.[79]

Federal Law and Policy

In enacting the provisions of the Education for All Handicapped Children Act, Congress focused on the notion that each child is unique. Consequently, a student with a disability should not receive an education based on the category of disability, but based on individual need. Section 504 regulations follow the same fundamental notion of individuality. The regulations define an "appropriate education" as "the provision of regular or special education and related aids and services that. . . are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met."[80]

With the IDEA Amendments Act of 1997,[81] Congress has sought to address the issue of labeling of students by increasing the age at which a school classifies a "developmental delay" within a specific disability category for purposes of service eligibility under the act from age 5 to age 9.[82] According to the legislative history of the statute, Congress' intent with this change in the law was

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[70] Barry, "What's In A Name?" p. 9.

[71] Ibid., pp. 9–10. *See also* Harry, *Cultural Diversity*, p. 246.

[72] Barry, "What's In A Name?" p. 10.

[73] Wang et al., "Serving Students at the Margins," p. 16. For example, special education programs would bear such labels as "Basic Skills," "Intensive Reading," and "Reading Recovery."

[74] Ibid.

[75] Prasse, "Legal Influence and Educational Policy in Special Education," p. 302.

[76] Gearheart, *Special Education for the '80s*, p. 70.

[77] Ibid., pp. 70, 72.

[78] Ibid., p. 72.

[79] Ibid.

[80] 34 C.F.R. § 104.33(b) (1996).

[81] Pub. L. No. 105–17 (1997).

[82] *See id.*, § 602(3)(B) (1997). *See also* chap. 5, pp. 22–23.

to address the problem of having the disability category rather than the child's individual educational needs drive the development of the child's IEP and educational placement. For example, the House report accompanying the bill stated that:

> The Committee believes that in the early years of a child's development, it is often difficult to determine the precise nature of the child's disability. Use of "developmental delay" as part of a unified approach will allow the special education and related services to be directly related to the child's needs and prevent locking the child into an eligibility category which may be inappropriate or incorrect, and could actually reduce later referrals of children with disabilities to special education.[83]

Beyond the provisions in Federal law and regulations, the U.S. Department of Education has offered policy to address the issue of labeling children and youth with disabilities. For example, the Department's Office of Special Education Programs (OSEP) has noted potential problems with labeling:

> The practice of 'labeling' children according to their category of disability may result in inappropriate removal of disabled children to segregated educational environments without appropriate consideration of whether each child could achieve satisfactory educational benefits by being educated with nondisabled peers, with the assistance of supplemental aids and services.[84]

OSEP has noted that Part B of the IDEA "does not require States to label children . . . [t]he Department has no objection to a State's use of categories which differ from those specified in Part B or, if it elects, the use of a noncategorical approach so long as those children eligible under Part B are appropriately identified and served."[85] Thus, as long as a State identifies students in need of special education and serves them appropriately, the State need not place a specific label designating a specific disability on children with disabilities.

Labeling: OCR's Enforcement Efforts

The section 504 regulations do not address the subject of labeling directly. OCR, however, has responded to questions about labeling and section 504 in policy memoranda and policy letters. In a 1985 policy memorandum on collective bargaining agreement provisions, OCR noted that classification on the basis of a disability is not "in and of itself unlawful, under either the Constitution or Section 504." According to the policy, a classification is lawful if it can be related sufficiently to the accomplishment of legitimate objectives.[86] The policy provides clarity to OCR's position on making classifications that are based on disability. In a 1994 policy letter, OCR directly addressed the issue of labeling in response to a question about children with attention deficit disorder (ADD). An individual posed the following policy question to DOEd and OCR about the IDEA Part B and section 504: "If the services a child with ADD requires are offered only within a program for children who are severely emotionally disturbed, must the child be 'shoehorned' into that category and labeled SED in order to get those services . . .?"[87]

The joint response offered by OSEP and OCR noted that the IDEA Part B and section 504 provide a guarantee of a free appropriate public education (FAPE), as defined respectively under each statute; they do not create an entitlement to a particular label. Further, the focus on the individual educational needs of each child "would preclude 'shoehorning' children into inappropriate placements." The policy letter implies that it is incorrect to assume that either the IDEA Part B or section 504 require a particular child to accept a particular label to be eligible for and receive FAPE.[88]

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[83] *See* H. Rep. No. 105–95, at 86 (1997).

[84] Thomas Hehir, Director, Office of Special Education Programs, U.S. Department of Education (DOEd), letter to William L. Clay, U.S. House of Representatives, Washington, DC, May 17, 1995, 23 IDELR 341.

[85] Ibid.

[86] Harry M. Singleton, Assistant Secretary for Civil Rights, DOEd, memorandum to Regional Civil Rights Directors, Regions I–X, "Collective Bargaining Agreement Provisions Restricting Placement of Handicapped Children in Regular Classes," June 12, 1985, p. 2.

[87] Thomas Hehir, Director, Office of Special Education Programs, and Jeanette J. Lim, Director, Policy Enforcement and Program Service, Office for Civil Rights (OCR), DOEd, letter to Michele Williams, Advocates for Children's Education, Miami, FL, pp. 6–7, no. 7, *reprinted from* OCR's Electronic Library file no. HQ951277.PDC.

Beyond that policy letter, OCR has approached labeling issues in a variety of contexts. First, because in some instances incorrect classification of students as disabled can lead to the inappropriate labeling of students who do not have disabilities, OCR has placed particular focus on school districts' referral, evaluation, and placement practices. In particular, OCR proactively has targeted misclassification problems for minority students, giving this issue priority.[89] OCR has focused compliance reviews on minority students and special education.[90] In addition, in 1995, it produced a comprehensive policy entitled "Minority Students and Special Education." This policy discusses the legal approaches to issues surrounding disproportionate representation in special education.

In a section entitled, "Civil Rights Implications of Minority Students and Special Education," the policy provides some history and background concerning minority students and special education as a critical civil rights concern. In that section, OCR notes that it "does not view special education itself as harmful or inappropriate for students with disabilities who need special education . . . Indeed, special education often provides the appropriate education for those students whose disabilities inhibit their learning in an unmodified, regular educational environment."[91] The section then discusses some of the potential consequences to inappropriate placement or misclassification, including the stigmatizing effect of inappropriate labels. According to the policy,

> [S]tudents who do not belong in the special education program, or who have been placed into the incorrect special education program, may experience stigma by virtue of their special education placement. For the child who is labeled incorrectly as mentally retarded, the consequences can be enormous. For a child who is labeled as mentally retarded, as opposed to a child who is labeled as learning disabled, there will be an almost automatic assumption that the child will not go to college. For many children it will mean being placed in an isolated separate class and no longer having access to the regular education curriculum. The stigma of being labeled as having "subaverage intellectual functioning" is also likely to be a serious consequence in terms of the child's own self perception and the perception of others including family, peers, teachers and future employers. These same kinds of factors will also affect children who are labeled as seriously emotionally disturbed.[92]

Beyond this mention of labeling in the context of a discussion of misclassification, OCR also has conducted complaint investigations that have touched on other labeling issues. For example, in a number of cases, OCR has determined that different treatment of students with disabilities through application of labels or designations does not violate section 504. In one case the complainant challenged the school district's practice of specifying on the report cards of students with disabilities their participation in special education programs. OCR found that the report cards of student with disabilities who participated in inclusion programs were notated with the phrase

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[88] Ibid.

[89] *See* DOEd, OCR, *Strategic Plan*, July 22, 1994, draft, p. 2.

[90] *See* chap. 5 for a discussion of OCR's approach in conducting these reviews.

[91] *See* Norma Cantú, Assistant Secretary for Civil Rights, OCR, DOEd, memorandum to All Staff, "Minority Students and Special Education," July 6, 1995, section entitled "Civil Rights Implications of Minority Students and Special Education," p. 1.

[92] *See* ibid.

"participating in inclusion programs." The school district reported that the notation was intended to indicate publicly to other schools, teachers, and the parents of the students that the class grade was based on different criteria than those of other students. OCR concluded that the facts were not sufficient to invoke OCR's complaint resolution activities because "Section 504 does not prohibit the use of report card notations which indicate whether students are participating in inclusion programs."[93] In another case, OCR determined that a school district's practice of not awarding academic credit for the "basic" and "special education" classes equivalent to the academic credit it awarded for "regular" classes on the same subject was a legitimate educational decision. According to OCR, it was a legitimate educational decision because differences in the method of instruction and in the quantity of the material covered between the classes were significant. Therefore, the class standings of students with disabilities placed in "basic" and "special education" classes were ranked legitimately as well.[94]

In a 1993 case, OCR investigated one school district's honor roll program. The complainants alleged that the program excluded their son and other students with disabilities from eligibility because of their disabilities. At the time of OCR's investigation, students had to earn a minimum grade point average of 3.0 in all courses attempted to be eligible for honor roll. Students receiving ability/effort grading would not be eligible. Ability/effort grades were awarded only to students with disabilities and only those students with disabilities who could not learn the same content as students without disabilities. OCR reviewed all students with disabilities for honor roll eligibility for the fall 1992 semester. Of 509 students with disabilities, 10 were graded on the same standards as students without disabilities; 3 of the 10 were placed on the honor roll for one or more grading periods; 66 at the junior and senior high school level achieved GPAs of 3.0 or higher; however, they were not placed on the honor roll because they were on ability/effort grading. The school district provided no alternative opportunity for these 66 students with disabilities to earn honors or awards reflecting their efforts and achievements. OCR determined that the school district was not in compliance with section 504 because it did not afford students with disabilities an equal opportunity for participation in an honors and awards program.[95]

Providing Access—Nonacademic Services and Extracurricular Activities; Transition Services

Nonacademic Services and Extracurricular Activities

Educational Perspectives and Policy

Nonacademic services such as extracurricular activities can provide important sources of self-esteem and means of developing social skills for many young people. For students with mental retardation, learning disabilities, behavioral disabilities, or serious emotional disturbance, achieving access to such activities, and to all of the programs, activities, and career opportunities available to students in a school's regular education program, reflects a crucial requirement for nondiscrimination and equal educational opportunity under section 504.[96]

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[93] Linda C. Colón, Compliance Team Leader, OCR, Region II, DOEd, letter to Ralph Bilbao, Superintendent, Carmel Central School District, Patterson, NY, re: Complaint No. 02–94–1125, Nov. 30, 1995, p. 2.

[94] John F. Stephens, Team Leader, OCR, Region VI, DOEd, letter to Richard A. Middleton, Superintendent, North East Independent School District, San Antonio, TX, re: Complaint No. 06–95–1209, Dec. 6, 1995, *reprinted in* 24 IDELR 298, 299.

[95] Taylor D. August, Regional Civil Rights Director, OCR, Region VI, DOEd, letter to Benny Gooden, Superintendent, Fort Smith Public Schools, Fort Smith, AR, re: Complaint No. 06–93–1028, Apr. 30, 1993, *reprinted in* 20 IDELR 97, 98–99.

[96] The section 504 regulation provides examples of nonacademic services and extracurricular activities. The examples include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to people with disabilities, and employment of students, including both employment by the recipient and assistance in making available outside employ-

Students with disabilities can benefit from participating in extracurricular activities academically, socially, and in the context of expanding postsecondary opportunities. For example, students identified as having a learning disability who participate in extracurricular activities are more likely, than those who do not, to advance to postsecondary education.[97] In addition, students with learning disabilities who participate in extracurricular activities also are more likely to use community resources for information on postsecondary opportunities. These resources can include contact with representatives of vocational rehabilitation and community colleges or other postsecondary institutions. They also are more likely to seek career related services from teachers and other faculty members than learning disabled students who do not participate in extracurricular activities.[98] However, despite the benefits extracurricular activities can provide, education studies indicate that for students with the disabilities considered in this report, such activities are not always as accessible as they are for their peers in a regular education program.[99]

Part of the reason for the limited participation in extracurricular activities for students identified as having these disabilities has been that access to such activities for these students often requires some degree of special effort merely to take part in them. Issues of concern in this context may relate to the scheduling, location, and the provision of related aids and services for specific activities.[100] For example, if a student with a learning disability has a language skill class scheduled in conflict with the meeting time for the science club in which he wants to participate, or if a student identified as having mental retardation wants to participate in a team sport, an issue of opportunity to participate presents itself. Schools must therefore undertake efforts to ensure that students with these and other disabilities, both mental and physical, have an equal opportunity to participate in extracurricular activities. The ways in which schools seek to address these access issues reflect how well schools are meeting their legal and educational obligations to ensure nondiscrimination and to provide equal access and opportunities to participate in all activities to students with disabilities.

Congress and the U.S. Department of Education have recognized the importance of providing access to extracurricular activities for students with disabilities by incorporating provisions addressing this access in education laws, regulations, and policies. For example, Federal law under section 504 requires that schools address extracurricular activities in meeting their obligations to students with disabilities. The section 504 regulations specify that a school system

> "shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities. . . . Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the [school], referrals to agencies which provide assis-

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ment. *See* 34 C.F.R. § 104.37(a)(2) (1995).

[97] Robert J. Miller, Bill Snider, and Chet Rzonca, "Variables Related to the Decision of Young Adults with Learning Disabilities to Participate in Postsecondary Education," *Journal of Learning Disabilities*, vol. 23, no. 6 (June/July 1990), p. 352 (hereafter cited as Miller et al., "Variables Related to the Decision of Young Adults with Learning Disabilities").

[98] Ibid.

[99] *See generally* Michael Murtaugh, "Achievement Outside the Classroom: The Role of Nonacademic Activities in the Lives of High School Students," *Anthropology and Education Quarterly*, vol. 19, no. 4 (December 1988) pp. 382-95; Edward J. Sabornie and James M. Kauffman, "Assigned, Received, and Reciprocal Social Status of Adolescents with and without Mild Mental Retardation," *Education and Training in Mental Retardation*, vol. 22, no. 3 (September 1987), pp. 139-49; Kimberly A. Schonert-Reichl, "Empathy and Social Relationships in Adolescents with Behavioral Disorders," *Behavioral Disorders*, vol. 18, no. 3 (May 1993), pp. 189-204.

[100] "Inclusive Education Programs, Inclusion Means More Than Just Academics," *OSEP Update*, vol. 3, no. 4 (April 1996).

tance to handicapped persons, and employment of students.[101]

In addition to incorporating extracurricular activities into the nondiscrimination provisions of section 504 and its regulations, Congress and the U.S. Department of Education have included provisions in the IDEA and its regulations to provide additional support to ensure that schools provide education programs for students with disabilities that improve their access to extracurricular activities. For example, the IDEA requires that each State recipient of funding under the statute establish "a goal of providing full educational opportunity to all children with disabilities."[102] In keeping with this requirement for "full educational opportunity," the IDEA's regulations state that "[e]ach public agency shall take steps to provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford children with disabilities an equal opportunity for participation in those services and activities."[103] The regulations define "nonacademic and extracurricular activities" as including "counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available."[104] In support of the IDEA and its regulations, State law typically reflects the language of the IDEA in requiring local education agencies to provide nonacademic and extracurricular activities for students with disabilities.[105]

In addition, some Federal courts have interpreted section 504 in the context of students with these disabilities in extracurricular activities. For example, in *Sandison v. Michigan High School Athletic Association, Inc.*,[106] a Federal court observed that: "[a]s a direct result of their participation in interscholastic sports, plaintiffs have shown academic and social improvement despite their disabilities."[107]

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[101] 34 C.F.R. § 104.37(a) (1996).

[102] Pub. L. No. 105–17, § 612(a)(2) (1997).

[103] 34 C.F.R. § 300.306(a) (1996).

[104] *Id.* § 300.306(b).

[105] For example, the Kansas State Department of Education requires that "each local education agency shall ensure that each child with a disability participates with nondisabled children to the maximum extent appropriate to the needs of that child." Kans. Admin. Regs. 91–12–35(f) (1996); South Dakota regulations state that "each school district shall provide nonacademic and extracurricular services and activities in the manner necessary to afford children in need of special education and special education related services an equal opportunity for participation in those activities. Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the district, referrals to agencies to provide assistance to persons with disabilities, and employment of students, including both employment by the district and assistance in making outside employment available." S.D. Admin. R. 24:05:28:05 (1996). The Washington Administrative Code states that each special education student shall be provided nonacademic and extracurricular services and activities conducted by the school district or other public agency with students who are not disabled to the maximum extent appropriate to the needs of the student. Nonacademic and extracurricular services and activities may also include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the district or other public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the district or other public agency and assistance in making outside employment by the district or other public agency and assistance in making outside employment available. Each school district or public agency shall take steps to ensure that its special education students have available to them the variety of educational programs and services available to nonspecial education students in the area served by the school district or public agency, including art, music, industrial arts, consumer and homemaking education, and vocational education. Wash. Admin. Code § 392–172–172 (1996).

[106] 863 F. Supp. 483 (E.D. Mich 1994), *reprinted in* 21 IDELR 658.

[107] *Id.* at 491, *reprinted in* 21 IDELR 658, 663.

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Education laws and policies, as they are enunciated in section 504 and the IDEA and their regulations, section 504 interpretations by the Federal courts, and State laws and policies, have drawn on the recommendations of education professionals including researchers and practitioners. A review of educational research literature discussing extracurricular activities for students with disabilities reveals that research studies are analyzing numerous issues involving extracurricular activities for children with disabilities and the relationship between extracurricular activities and the promotion of educational opportunities for such students. Some of the issues addressed in recent education research studies include the correlation between certain disabilities such as behavioral disabilities and mental retardation and lower levels of social mobility and participation in extracurricular activities; the impact of extracurricular activities at the secondary school level on participation in postsecondary education; extracurricular activities as a means of promoting the development of social skills; innovative ideas for creating recreation programs integrated between students with disabilities and those without; and the relationship between social activities and academic performance.[108]

Some education research studies have shown that there is a negative correlation between the presence of a disability and the ability of students to form social relationships and participate in extracurricular activities. For example, one study compared social competency between 39 adolescent males identified as having behavioral disorders and 39 age-matched peers without behavioral disorders. The study found that the adolescent males identified as having behavioral disorders participated in fewer extracurricular activities, had less frequent contacts with friends, and had lower quality relationships than their peers.[109] Another study evaluating high school students identified as mentally retarded found that these students rated their peers more negatively and themselves received more negative ratings for participation in extracurricular activities than their peers.[110] The literature also indicates that there is a correlation between learning and behavioral disabilities and the tendency toward delinquent behaviors among youth.[111] Several other research studies have addressed the relationship between learning disabilities and participation in extracurricular activities. These studies have found that students identified as having learning disabilities appear to be less involved in extracurricular activities than their peers in regular education programs. Furthermore, these studies have shown that there is a positive connection between participation in extracurricular activities and the development of self-esteem for students with learning disabilities and/or low academic achievement.[112]

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[108] *See generally* Mary H. Bluechardt and Roy J. Shephard, "Using an Extracurricular Physical Activity Program to Enhance Social Skills," *Journal of Learning Disabilities*, vol. 28, no. 3 (March 1995), pp. 160-69; Miller et al., "Variables Related to the Decision of Young Adults with Learning Disabilities," pp. 349-54; M. Sherril Moon et al., "Finding or Creating the Fun in Your Community or School: Places and Ways To Integrate Recreation Programs. Project REC." (Boston, MA: Training and Research Institute for People with Disabilities, 1992); Murtaugh, "Achievement Outside the Classroom;" Lynn Newman, "The Relationship Between Social Activities and School Performance for Secondary Students with Learning Disabilities: Findings From the National Longitudinal Transition Study of Special Education Students," prepared for presentation to the Social Context of Education Division, American Educational Research Association annual meetings, Chicago, IL, April 1991 (Menlo Park, CA: SRI International, 1991).

[109] *See* Kimberly A. Schonert-Reichl, "Empathy and Social Relationships in Adolescents with Behavioral Disorders," *Behavioral Disorders*, vol. 18, no. 3 (May 1993), pp. 189-204.

[110] *See* Edward J. Sabornie and James M. Kauffman, "Assigned, Received, and Reciprocal Social Status of Adolescents with and without Mild Mental Retardation," *Education and Training in Mental Retardation*, vol. 22, no. 3 (September 1987), pp. 139-49.

[111] Madeline Reiter, "School Achievement and Juvenile Delinquency: A Review of the Literature" (University of the Pacific, School of Education, May 1982) (This paper reviews research investigating the relationship between delinquency and school achievement, particularly emphasizing literature published between 1971–1982. Noted among the findings are that 42 percent of the population in juvenile corrections institutions consists of children with disabilities under P.L. 94-142 (the Education for All Handicapped Children Act, the IDEA since 1990); and that a lower incidence of delinquency is found among individuals who participate in extracurricular activities. The evidence reviewed shows that social class variables are causal for patterns of delinquency. Included among the "class characteristics" observed are identification as learning disabled, which, according to the evidence reviewed, carries with it a high risk for delinquency. Other findings cited are that academic achievement (particularly in the area of reading) has been associated with delinquent behavior, a lag in neurological development and deficiencies in attention span are evident in students with antisocial behavior disorders, and youth who

One of these studies found that students in regular education programs were more likely than students in special education programs to be seriously involved in activities outside of school. The study found that students who are "mildly handicapped" are "similar to the regular education students in their range of interests, but overall are less likely to have interests outside of school."[113] Importantly, this study's findings suggest:

> [f]or many students who are far from the top of their class, outside activities appear to offer an alternative path to achievement and self-esteem. Activities can provide students with a sense of accomplishment and involvement, an opportunity to, in effect, create their own path to achievement. . . . Rather than regard these activities as mere distractions from schoolwork, greater attempts should be made to recognize and encourage the positive aspects of students' outside interests.[114]

Another study, the National Longitudinal Transition Study of Special Education Students, provided data for a report that examined whether social activities had an impact on the academic performance of a sample of 832 students identified as having learning disabilities.[115] The study found that informal contacts with friends had negative effects on students' academic performance, but that participation in group and community activities generally were beneficial. More than one-third (37.8 percent) of the sampled students reported seeing friends informally outside of school 6 or 7 days a week.[116] These students had higher absenteeism from school and were more likely to have received a failing grade than students who were less actively involved with friends on an informal basis outside of school.[117] High absenteeism and grade failure were among the strongest predictors of youth dropping out of school. In contrast, sampled students who were engaged in organized school or community groups as group participants had significantly lower school absenteeism and better grade performance.[118] The report's findings suggested that "[s]tudents who bonded with school, whose friend-

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have a low success rate are very vulnerable to participating in delinquent behavior.)

[112] *See* Murtaugh, "Achievement Outside the Classroom," and Newman, "The Relationship Between Social Activities."

[113] Murtaugh, "Achievement Outside the Classroom," p. 394.

[114] Ibid., pp. 394–95.

[115] *See* Newman, "The Relationship Between Social Activities," p. 2. The National Longitudinal Transition Study of Special Education Students (NLTS), conducted by SRI International for the U.S. Department of Education, Office of Special Education Programs, included a nationally representative sample of more than 8,000 students, in all disability categories, who were ages 13 to 21. The sample represented youth in all 11 Federal disability categories, including youth classified as having a learning disability, and permitted findings to be generalized nationally for each disability group. Ibid.

[116] Ibid., figure 1, p. 23.

[117] Ibid., pp. 16–18 (noting that "[s]tudents with learning disabilities experienced some problems with school performance, in terms of absenteeism and course failure. They averaged almost 15 days absent from school, with a quarter absent for more than 20 days. More than one third had failed a course in their most recent school year. These aspects of school performance are powerful predictors of youth with disabilities dropping out of school. . . . A first look at the differences in these two school performance measures for students with learning disabilities reveals that youth who belonged to groups were significantly less likely than non-participants to be absent from school and to have failed one or more classes in their most recent school year.").

[118] Ibid., pp. 17, 22 (noting that "[w]e see a consistent pattern of relationship between group participation and better school

ships did not overly compete with the time needed to meet school responsibilities were better students."[119] The report encouraged schools to provide opportunities for students with varying interests to find social memberships and help parents set guidelines for appropriate out-of-school social activities.[120] Importantly, the report observed:

> [a]n important goal of mainstreaming has been to provide students with disabilities access to and constructive interaction with nonhandicapped peers (Johnson and Johnson, 1980). In keeping with this expectation, we find that for students who attended regular secondary schools, the greater the percentage of the day youth spent in regular education classrooms, the more likely they were to be group participants and the less likely they were to be isolated. For example 16% of those who were mainstreamed for less than a third of their classes rarely saw friends outside of school, while only 3% of those who were mainstreamed for all of their classes rarely saw friends. . . . In terms of group experiences, 67% of those who spent their entire day in regular education classrooms, and 50% of those who were mainstreamed for two-thirds or more of their instructional time were group members, compared to 32% of those mainstreamed for one-third or less of their school day.[121]

Another study on students with learning disabilities focused on post high school educational experiences, particularly emphasizing the relationship between post-graduation education and a number of factors including participation in extracurricular activities.[122] This study used data gathered from students having a variety of disabilities including 539 young adults identified as having learning disabilities. Relying on the "Iowa Statewide Follow-Up Survey" instrument, originally developed by a task force of special educators and administrators from throughout the State of Iowa to gather post-graduation information on high school students who had participated in special education, the researchers used the instrument to gather information on a random sample of all special education graduates, dropouts, and students terminated from the program at 21 years or older from the 1984–85 academic class. This included young adults from all disability groups, including those with behavioral disorders, learning disability, and "mental disability."[123]

This study found a positive correlation between participation in extracurricular activities among high school students identified as having learning disabilities and their participation in postsecondary education programs. The researchers stated in their conclusion that they had found "involvement in extracurricular activities while in high school to be an important indicator of participation in postsecondary education."[124] In addition, the researchers noted:

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performance. Students who belonged to groups were absent from school significantly fewer days, other factors being equal. Those belonging to school or community groups were estimated to miss 4.3 days less in the school year than students without such affiliations. . . Similarly, group members were significantly less likely to have failed a course in their most recent school year. . . The NLTS estimates that the likelihood of failing a course was 11.6 percentage points lower for group participants than for non-participants." Ibid., p. 22).

[119] Ibid., p. 25.

[120] Ibid., pp. 24–25 (stating that "[w]e have seen a consistent pattern of positive outcomes for students who were engaged in school or community groups. Students who found a niche in organized groups had significantly lower school absenteeism and better grade performance. . . . Schools can support a wide variety of social, hobby, athletic, service, leadership, and other groups so that students with widely diverse interests and abilities have opportunities to establish social affiliations and exercise the roles and behaviors of good citizenship. NLTS data suggest that young people who have established such social affiliations benefitted in many ways throughout their secondary school careers and early adulthood.").

[121] Ibid., pp. 14–15.

[122] *See* Miller et al., "Variables Related to the Decision of Young Adults with Learning Disabilities," pp. 349–54.

[123] Ibid., p. 350.

[124] Ibid., p. 352.

> [t]he present research identified involvement in extracurricular activities as a major indicator of participation in postsecondary education. Successful integration into the extracurricular activities in the high school is a vehicle for students with LD to increase their perceived feelings of belonging with regard to school, as well as a way to increase acceptance by their nondisabled peers. . . . Little systemic effort has been geared toward integration of students with LD into extracurricular activities. The data from this study indicate that more effort should be expended to increase integration of students with learning disabilities into extracurricular activities.[125]

Education research studies also have sought to identify activities that can help to promote educational opportunities for students identified as having these disabilities. Some of this research has shown that participation in extracurricular activities can have a positive impact on the quality of educational and life experiences for such students.[126] For example, one study examined the use of extracurricular physical activities as a means of enhancing social skills for students identified as having learning disabilities. This study showed that participation of students (ages 8–10) identified as having learning disabilities in a 10-week individualized activity program with an embedded social skills component provided improvements in motor proficiency, self-ratings of academic and nonacademic competence, and teacher ratings of students' social behaviors. The study's findings suggested that the opportunity presented by the physical activity program for the students to develop their motor proficiency led to improved feelings of self-worth.[127] The authors attributed these positive effects in part to the individualized attention the students received while participating in the physical activity program. They noted:

> [i]t might reasonably be suggested that the children needed individual instruction in social skills, and that they benefitted equally from specialized instruction and personal support, regardless of whether this was provided in the context of physical activity or an academic learning program (Elkind, 1984; Hauser & Bowlds, 1990). Individualized positive feedback could have increased motivation and enhanced perceived competence (Vallerand & Reid, 1985), with resultant gains in actual performance. Once skills improved, the children would have experienced less rejection by their

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[125] Ibid., p. 353. In addition, the authors state that: "experience in the public schools may be, in general, less positive for students with learning disabilities."
Studies by Bryan (1976) and Bruininks (1978) found students with LD to be less accepted and less well liked by their peers. Deshler (1978) suggested that inability to achieve, lack of success, and nonreinforcing experiences may all lead to undesirable behavior and attitudes in students with disabilities. These behaviors and attitudes may include poor self-perception, lower self-concept, or reduced motivation. Siegel (1979) argued that years of frustration in school can cause insecurity and self-doubts in the students with learning disability. Bingham (1980) described the adolescent with learning disabilities as likely to have experienced many years of viewing themselves, and being viewed by others, as ineffective, marginal, and unsuccessful. Special education in the public school must continue to assist these students to develop the best possible reading, mathematics, and other academic areas. However, many of these students may never read or compute at grade level. Special education must continue to explore intervention strategies to minimize the effects of poor academic skills on these students of 'average or above-average' intelligence so that they can succeed in academic coursework." Ibid.

[126] *See e.g.* Bluechardt and Shephard, "Using an Extracurricular Physical Activity Program," pp. 160-69; M. Sherril Moon et al., "Finding or Creating the Fun in Your Community or School: Places and Ways To Integrate Recreation Programs. Project REC." (Boston, MA: Training and Research Institute for People with Disabilities, 1992). Developed as part of a project to integrate youth with disabilities into regular recreational and leisure activities, this report attempted to identify several programs and specific types of leisure activities that children, adolescents, and young adults with and without disabilities can enjoy together regardless of skill level. Case studies are provided to illustrate successful integration in several programs and activities. Programs discussed include: the Young Men's Christian Association (YMCA), Boy and Girl Scouts, 4–H, parks and recreation, programs, community soccer leagues, community theater groups, programs of the Association for Retarded Citizens, social integration at school, friendship clubs (composed of nondisabled students interested in becoming involved with students having disabilities), integration during school activity periods, lunch buddies, summer friendship/outing groups, and school sports teams.

[127] Bluechardt and Shephard, "Using an Extracurricular Physical Activity Program," pp. 166–67. The authors note that there appeared to be a "directional relationship from motor proficiency to subsequent self-worth." Ibid., p. 166.

peers and would have been better able to process information and display appropriate affective reactions (Weiss, 1987). More appropriate social interactions might also have yielded continuing progress after cessation of the formal program.[128]

These research findings underscore the importance of institutional efforts at all levels of education policymaking—Federal, State, and local—to provide access to and promote participation of students with learning disabilities, behavioral disabilities, serious emotional disturbance, and mental retardation in extracurricular and other available social and recreational activities. Because this population long has represented a particularly high risk group for exclusion from such activities, the Office for Civil Rights undertakes its own efforts to ensure that schools remain aware of the need to place special emphasis on the participation of students with disabilities in *all* of the activities that the regular education program has to offer. OCR's efforts constitute an important means through which the U.S. Department of Education can ensure that schools are meeting both the letter and intent of their legal obligations under the section 504 statute and its regulations.

Nonacademic Services and Extracurricular Activities: OCR's Enforcement Efforts

In addressing access to nonacademic services and extracurricular activities for students with disabilities, OCR implements section 504's nondiscrimination provision through regulatory provisions that state:

> [i]n providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.[129] . . . A recipient to which this subpart applies shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.[130]

In addition, the regulations provide a definition for the term "extracurricular activities," along with a series of examples.[131] The regulations also state with respect to physical education and participation in interscholastic sports that:

> [i]n providing physical education courses and athletics and similar programs and activities to any of its students, a recipient . . . may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.[132]

The appendix to the section 504 regulations states that "[b]ecause these services and activities are part of a recipient's education program, they must, in accordance with the provisions of § 104.34, be provided in *the most integrated setting appropriate*."[133] However, the appendix notes that the regulations "permit separation or differentiation with respect to the provision of physical education and athletics activities, but only if qualified handicapped students are also allowed the opportunity to compete for regular teams or participate in regular activities." The appendix notes further that "[m]ost handicapped students are able to participate in one or more regular physical education and athletics activities. For example, a student in a wheelchair can participate in a regular archery course, as can a deaf student in a wrestling course."[134]

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[128] Ibid., p. 166; S. Hauser & M. Bowlds, "Stress, Coping, and Adaptation," in S. Feldman & G. Elliot, eds., *At the Threshold, the Developing Adolescent* (Cambridge, MA: Harvard University Press, 1990), pp. 388–413; R.J. Vallerand & G. Reid, "Intrinsic Motivation: Implications for Teaching the Failure-Prone Performer," unpublished manuscript, 1985; M.R. Weiss, "Self-Esteem and Achievement in Children's Sport and Physical Activity," in D. Gould & M.R. Weiss, eds., *Advances in Pediatric Sport Sciences: Behavioral Issues* (Champaign, IL: Human Kinetics, 1987), pp. 87–119.

[129] 34 C.F.R. § 104.34(b) (1996).

[130] *Id.* § 104.37(a)(1).

[131] *See id.* § 104.37(a)(2). These include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to people with disabilities, and employment of students, including both employment by the recipient and assistance in making available outside employment. *Id.*

[132] *Id.* § 104.37(c)(1).

[133] *Id.* Pt. 104, App. A., p. 376, no. 26. (1996) (emphasis added).

OCR generally develops its compliance standards through policy guidance addressing specific issues. However, to date, OCR has issued little policy guidance specifically addressing nonacademic services and extracurricular activities.[135] Instead, it appears that OCR has fashioned its section 504 compliance standards with respect to the participation of students identified as having disabilities, including students identified as having learning disabilities, behavioral disorders, serious emotional disturbance, or mental retardation, in extracurricular activities and other nonacademic services mainly through "case-by-case" analyses developed in its case letters. For example, OCR has stated in a case letter that "uniform application" of eligibility requirements will satisfy the nondiscrimination requirements of section 504.[136] Elsewhere in its case letters, OCR has stated that when the provision of a reasonable accommodation is needed to enable a student with a disability to participate, the local education agency is required to modify "non-essential eligibility requirements."[137] In addition, OCR has stated that the school district must provide reasonable accommodation to remove barriers to participation in a nonacademic or extracurricular activity.[138]

Providing reasonable accommodation to students with disabilities remains a focal point of unresolved compliance issues with respect to nonacademic services and extracurricular activities. For example, there remain problematic compliance issues relating to reasonable accommodation to ensure the participation of students with learning disabilities in interscholastic sports. There is confusion rising from Federal court rulings that OCR has not resolved in its policy guidance. This confusion results from conflicting rulings as to the meaning of "reasonable accommodation" for participation in interscholastic sports. Specifically, the courts have reached differing conclusions in determining whether an eligibility requirement is essential or whether it can be modified to provide reasonable accommodation.[139]

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[134] *Id.*

[135] OCR has issued a policy guidance addressing the application of section 504 to "noneducational programs, such as day care, after-school care, and summer recreational programs." However, this policy guidance explicitly states that "these programs should be distinguished from extracurricular activities and nonacademic services that are a part of a public elementary or secondary education program." *See* William L. Smith, Acting Assistant Secretary for Civil Rights, DOEd, OCR Senior Staff Memorandum, Jan. 3, 1990.

[136] *See, e.g.* Robert A. Smallwood, Regional Civil Rights Director, OCR, Region III, DOEd, letter to Thomas W. Holtzman, Jr., Superintendent, Susquehana Township School District, Harrisburg, PA, re: Complaint No. 03–93–1013, Apr. 8, 1993, *reprinted in* 20 IDELR 35 (finding that the uniform application of academic attendance eligibility requirements for participation in interscholastic football is appropriate).

[137] *See, e.g.*, Jeanette L. Lim, Acting Regional Director, OCR, Region III, DOEd, letter to Leroy Kite, Superintendent, Quaker Valley School District, Sewickley, PA, re: Complaint No. 03–86–1077, Aug. 19, 1986, 352 EHLR 235 (finding that section 504 required accommodation (in the form of an escort to assist with walking and assistance in dressing for swimming) for a student who was mentally retarded with a neuro-degenerative disorder affecting motor, sensory and other functions in order for the student to participate in field trips and swimming program).

[138] *See, e.g.*, Paula Kuebler, Regional Director, OCR, Region II, DOEd, letter to John Sommi, Superintendent, Bethpage Union Free School District, Bethpage, NY, re: Complaint No. 02–89–1145, Apr. 12, 1990, *reprinted in* 16 EHLR 1086 (OCR 1990) (finding that the LEA's failure to provide late bus transportation for a disabled student who had been placed out-of-district denied the student opportunity to participate in extracurricular activities).

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This issue primarily has arisen in cases where schools have sought to apply age requirements for participation in interscholastic sports programs. These age limitations have operated to deny participation to students identified as having learning disabilities, particularly when such students have experienced grade retention. For example, in the case of *Pottgen v. Missouri State High School Activities Association*,[140] the eighth circuit upheld an age limitation as an essential eligibility requirement in an interscholastic sports program even though this requirement operated to prohibit students with learning disabilities who had experienced grade retention from participation. The *Pottgen* court held that a student who exceeded the age limit imposed by the athletic association was not "otherwise qualified" because the age limit was an essential or necessary eligibility requirement.[141] Neither section 504 nor the ADA required waiving the age limit because waiver of such an essential eligibility requirement "would constitute a fundamental alteration" of the program and was therefore not a reasonable accommodation.[142] The court stated:

> [a]n age limit helps reduce the competitive advantage flowing to teams using older athletes; protects younger athletes from harm; discourages student athletes from delaying their education to gain athletic maturity; and prevents over-zealous coaches from engaging in repeated red-shirting to gain a competitive advantage. These purposes are of immense importance in any interscholastic sports program.[143]

However, in the case of *Sandison v. Michigan High School Athletic Association, Inc.*,[144] a Federal court in Michigan found that students with learning disabilities who exceeded an age limitation on participation were "otherwise qualified" under section 504 because the age limitation could be waived *without* fundamentally changing the nature of the program.[145] The waiver therefore reflected a reasonable accommodation.[146] While reaching this conclusion, the *Sandison* court nevertheless reviewed criteria similar to that reviewed by the *Pottgen* court in its analysis for determining what constituted a reasonable accommodation. For example, like the court in *Pottgen*, the *Sandison* court also based its analysis on safety concerns for younger players and the use of older athletes to obtain an unfair competitive advantage.[147] However, based on these criteria, the court noted:

> [p]laintiffs are attempting to participate in two noncontact sports, cross country and track. Therefore, the safety concern is not an issue in this case. Additionally, plaintiffs have been described as mid-level competitors by their respective coaches. (Test. of Coaches William Cicciarelli and Patrick Wilson, Sept. 6, 1994.) Thus, although they are not at the bottom of the team roster, they are not the "star" players so as to provide any

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[139] *See, e.g.*, Pottgen v. Missouri State High School Activities Association, 40 F.3d 926 (8th Cir. 1994), *reprinted in* 21 IDELR 929 (upholding an age limitation requirement as an essential eligibility requirement); Sandison v. Michigan High School Athletic Association, Inc., 863 F. Supp. 483 (E.D. Mich. 1994), *reprinted in* 21 IDELR 658 (preliminarily enjoining a high school athletic association from imposing an age limitation for participation because waiver of the age limitation eligibility requirement is a reasonable accommodation); University Interscholastic League v. Buchanan, No. 3–92–108–CV (Tex. Ct. App. 1993), *reprinted in* 19 IDELR 683 (permanently enjoining enforcement of a league rule that prohibited participation in varsity sports by students who turned 19 before an applicable cutoff date as a violation of section 504).

[140] 40 F.3d 926 (8th Cir. 1994), *reprinted in* 21 IDELR 929.

[141] *Id.* at 929, *reprinted in* 21 IDELR at 931.

[142] *Id.* at 930, *reprinted in* 21 IDELR at 931.

[143] *Id.* at 929, *reprinted in* 21 IDELR at 931.

[144] 863 F. Supp. 483 (E.D. Mich. 1994), *reprinted in* 21 IDELR 658.

[145] *Id.* at 483, 490, *reprinted in* 21 IDELR 658, 662.

[146] *Id.* at 490, *reprinted in* 21 IDELR 658, 662 (emphasis added).

[147] *Id.* at 490, *reprinted in* 21 IDELR 658, 662.

unfair competitive advantage to their respective teams.[148]

The rationale advanced by the courts provides an analysis for determining what constitutes "reasonable accommodation" based on the competing interests of the school and the students.[149] These two cases illustrate the tension that currently exists in the Federal courts as to whether an eligibility requirement is essential or whether it can be waived as a reasonable accommodation and, if so, under what circumstances. The differing conclusions appear to derive from the facts of each case. The *Sandison* court explicitly stated:

> [d]efendant's argument that it will suffer an undue burden through increased eligibility challenges takes [the court's] conclusion too far. The conclusion [the court reaches] today is not universal. It is to be applied on a case-by-case basis. The facts of each case will dictate the proper result under the ADA and the Rehabilitation Act. There may be an instance where a disabled individual should be denied participation on the basis of the concerns expressed by defendant, safety and unfair competitive advantage. In that case, when and if it should arise, defendant should respond accordingly after carefully analyzing the situation and balancing the goals of the ADA and the Rehabilitation Act, the rights of handicapped individual and the best interests of the interscholastic sports program.[150]

Although the Federal courts have offered differing interpretations of the section 504 regulations on the issue of whether a program requirement such as an age eligibility rule can be waived as a reasonable accommodation, a review of OCR's policy documents reveals that OCR has not attempted to resolve this controversy in its policy guidance or case letters despite its authority to do so. In the absence of such policy guidance or case letters, it appears that OCR follows the "case-by-case basis" relied on by the court in *Sandison*.[151] It would therefore seem logical for OCR to refer to this case and its reasoning, as well as other important cases on reasonable accommodation under section 504, such as *Alexander v. Choate*, in a policy guidance that would address this issue.

In conducting its enforcement activities, OCR has addressed the reasonable accommodation issue with respect to age limitation rules for participation in interscholastic sports. For example, in a 1985 case, OCR investigated a complaint against the Maine Department of Educational and Cultural Services involving a statewide age limitation rule on participation in interscholastic sports.[152] OCR found that an age limitation rule that operated to prevent the participation of students with disabilities in interscholastic sports did not violate section 504.[153] In this case, OCR reasoned that the age eligibility rule was neutral on its face.[154] In addition, OCR found the athletic association's stated reason for the rule, "to prevent older, more experienced athletes from gaining an advantage over younger athletes in contact sports" to be "a legitimate, nondiscriminatory reason."[155] Elsewhere in conducting its enforcement activities, OCR has found section 504 violations based on noncompliance with the regulatory provision requiring that recipients of Federal funding provide nonacademic and extracurricular services and activities "in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities."[156]

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[148] *Id.* at 490, *reprinted in* 21 IDELR 658, 662.

[149] The court stated that "the inquiry when an individual does not meet the specific requirements of a particular program is whether reasonable accommodation can be made to enable the disabled individual to meet the program's requirements." *Id.* at 489. *See also* Alexander v. Choate, 469 U.S. 287, 301 (1985)(stating that the proper balance of interests "requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.").

[150] 863 F. Supp. 483, 490–91, *reprinted in* 21 IDELR 658, 662–63.

[151] *Id.* at 491, *reprinted in* 21 IDELR 658, 662 (stating that the conclusion of the court was "not universal" and that such a conclusion can only be reached through a case-by-case analysis). In each case, OCR determines whether the requirement is neutral on its face; whether it tends to screen out students with disabilities; and whether it can be changed or waived in individual cases without altering the fundamental nature of the program.

[152] *See* Richard V.E. McCann, Regional Director, OCR, Region II, DOEd, letter to Robert E. Boose, Commissioner, Maine Department of Educational and Cultural Services, Augusta, ME, re: Complaint No. 01–84–1061, June 28, 1985, 352 EHLR 31.

[153] Ibid., p. 32.

A review of OCR's case letters addressing compliance issues relating to nonacademic services and/or extracurricular activities reveals that OCR has found a violation when a school district "failed and refused to provide transportation" to a student with a disability "as was provided for students without disabilities," thus denying the student with a disability "an equal opportunity to participate" in an extracurricular activity.[157]

OCR also has found violations when schools have denied students with disabilities access to extracurricular activities by a failure to provide related aids and services. For example, OCR found a school district in Pennsylvania in violation of section 504 regulation 104.37 by denying the student equal opportunity to participate in field trips and swimming programs. The case involved a mentally retarded student who was the only student excluded from a school field trip. The school mainly cited safety concerns as justification for her being excluded from the trip. With respect to the swimming class, the school cited safety concerns, and stated that the student was enrolled in an adaptive physical education program, whereas swimming was in the regular education program. OCR held that the student could have participated in field trips and swimming if provided adequate accommodations.[158]

OCR does not always find violations of section 504 regulations in cases involving disabled students being denied opportunities to participate in extracurricular activities. For instance, in a case involving a learning disabled student being denied the opportunity to play football, OCR found that the school's decision to deny the student the opportunity to participate was in compliance with section 504. OCR's analysis revealed that the student was not allowed to participate because he had failed two courses and did not meet the "no pass, no play" standard of the school district. This criterion was applied to all students who wish to participate in extracurricular activities, therefore, the denial of participation was not based on his disability and was not discriminatory.[159]

During its enforcement activities, OCR also considers whether extracurricular activities delivered to disabled students are comparable to those provided to regular education students. The section 504 regulations require schools to implement education programs that provide equal opportunities and are equally effective. For example, OCR held for the complainant in a case involving separate summer recreation programs for disabled and nondisabled students. The OCR analysis revealed that the program being provided for regular education students was scheduled for 8 weeks while the program for moder-

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[154] Ibid., p. 31.

[155] Ibid., p. 32.

[156] 34 C.F.R. § 104.37(a)(1) (1996).

[157] *See* Brenda Johnson, Team Leader, OCR, Region III, DOEd, letter to Gerard Fowler, Superintendent, Carlisle Area School District, Carlisle, PA, re: Complaint No. 03–95–1042, Mar. 31, 1995, p. 2 (hereafter cited as Johnson letter re: OCR Complaint No. 03–95–1042).

[158] Jeanette J. Lim, Acting Regional Director, OCR, Region III, DOEd, letter to Leroy Kite, Superintendent, Quaker Valley School District, Sewickley, PA, re: Complaint No. 03–86–1077, OCR/Complaint LOFs, Supplement 186, Feb. 13, 1987.

[159] Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, DOEd, to Kathryn M. Shehane, Superintendent, Douglas County School District, Douglasville, GA, re: Complaint No. 04–95–1567, LOF, Feb. 13, 1996 (hereafter cited as Meyer LOF re: OCR Complaint No. 04–95–1567).

ately and severely disabled students lasted 7 weeks. OCR held that the school district violated section 504 regulation 104.4(b)(1)(ii).[160]

Mainstreaming and inclusion concerns also can be focal areas during OCR enforcement activities in the context of nonacademic and extracurricular activities. The regulations clearly indicate that schools must allow disabled students to interact with nondisabled students in nonacademic and extracurricular settings to the "maximum extent appropriate to the needs of the handicapped person in question."[161] In this regard, OCR determines if disabled students are provided daily contact with their nondisabled peers. For instance, OCR found a school district in violation of 104.34(b) for failing to provide daily opportunities for disabled students to interact with regular education students in activities such as "meals, recess, teams and clubs." Some extracurricular and nonacademic programming did allow for interaction with nondisabled students, however, OCR held that those programs did not "provide daily contact contemplated by the regulation. . . ."[162]

Transition Services

Educational Perspectives and Policy

For over a decade, special educators and other professionals have made the quality of programs that influence the postsecondary outcomes experienced by students with disabilities one of the priorities in special education.[163] Transition services are a crucial aspect of effective education programs for all students with disabilities, including students with learning disabilities, mental retardation, behavior disorders, and serious emotional disturbance.[164] Recognizing the importance of transition services for students with disabilities, Congress, in 1983, instituted a major initiative to promote the development and operation of vocational, technical, postsecondary, and adult education programs for individuals with disabilities.[165] This legislation created several topic-specific grant programs, one of which assists in the transition of students with disabilities from secondary education to adult life. Under these programs today, grants are available for institutions of higher education, State educational agencies, local educational agencies, and other institutions or agencies to "improve secondary and postsecondary education and transitional services for children with disabilities."[166] Among the activities funded through these grants are "Research and Innovation to Improve Services and Results for Children with Disabilities,"[167] including:

- developing or identifying innovative, effective, and efficient curricula designs, instructional approaches, and strategies, and developing or identifying positive academic and social learning opportunities, that . . . enable children with disabilities to make effective transitions . . . improve educational and transitional results for children with disabilities at all levels of the educational system in which the activities are carried out and, in particular, that improve the progress of the children, as measured by assessments within the general education curriculum involved;[168] and

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[160] Meyer LOF re: OCR Complaint No. 04–95–1567. The regulations state in part that school cannot "afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others. . ." 34 C.F.R. § 104.4(b)(1)(ii) (1996).

[161] 34 C.F.R. 104.34(b) (1996).

[162] OCR, DOEd, letter to Alvin Dubois, Superintendent, Atherton Community School District, Burton, MI, re: Complaint No. 15–90–1017, Jan. 25, 1990, 16 EHLR 811, Supplement 268, June 29, 1990.

[163] Michael R. Benz, Paul Yovanoff, and Bonnie Doren, "School-to-Work Components That Predict Postschool Success for Students with and Without Disabilities," *Exceptional Children*, vol. 63, no. 2 (Winter 1997), pp. 151–52 (hereafter cited as Benz et al., "School-to-Work Components That Predict Postschool Success").

[164] *See* Paula D. Kohler and Frank R. Rusch, "Secondary Educational Programs and Transition Perspectives," in Margaret C. Wang, Maynard C. Reynolds, and Herbert J. Walberg, eds., *Handbook of Special and Remedial Education: Research and Practice* (New York, NY: Elsevier Science, 1995), pp. 107–08, 116–17; Leonard Garfinkel, *Legal Issues in Transitioning Students* (Horsham, PA: LRP Publishers, 1995), pp. 1–3—1–4; Jean Whitney-Thomas and Cheryl Hanley-Maxwell, "Packing the Parachute: Parents' Experiences as Their Children Prepare to Leave High School," *Exceptional Children*, vol. 63, no. 1 (1996), pp. 75–76.

[165] Pub. L. No. 98–199, § 10, 97 Stat. 1367 (1983).

[166] Pub. L. No. 105–17, § 672(a)(5) (1997).

- identifying and disseminating solutions that overcome systemic barriers to the effective and efficient delivery of early intervention, educational, and transitional services to children with disabilities.[169]

In 1990, Congress added a provision on "transition services" to the IDEA's Part B grant program.[170] This provision defines "transition services" as "a coordinated set of activities . . . which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation."[171] The transition services provided must "be based on the individual student's needs, taking into account the student's preferences and interests"[172] and "include instruction, community experiences, the development of employment and other post-school adult living objectives and if appropriate, acquisition of daily living skills and functional vocational evaluation."[173] The statute and its implementing regulations also state that in developing individualized education programs for students with disabilities, schools must include "a statement of the needed transition services for students beginning no later than age 16 and annually thereafter."[174]

The IDEA has established requirements for placing students into special education, and State and local school district requirements serve to enhance successful entry into and exit out of special education programs. The specific kinds of transition services for students with disabilities vary from State to State, and the availability of such services depends on funding administered by State education agencies, which, in turn, operate through funding received under Federal mandates and initiatives.[175] The findings of one study serve to illustrate how States develop policies and

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[167] *See id.* § 672 (1997).

[168] *Id.* § 672(b)(2)(B) (1997).

[169] *Id.* § 672(c)(2)(D) (1997).

[170] Pub. L. No. 101–476 § 101, 104 Stat. 1103 (1990).

[171] Pub. L. No. 105–17, § 602(30)(A) (1997); 34 C.F.R. § 300.18(a) (1996). *See also* Betty Aune and Mary Friehe, "Transition to Postsecondary Education: Institutional and Individual Issues," *Topics in Language Disorders*, vol. 16, no. 3 (1996), p. 2.

[172] Pub. L. No. 105–17, § 602(30(B) (1997); 34 C.F.R. § 300.18(b)(1) (1996).

[173] Pub. L. No. 105–17, § 602(30)(C) (1997); 34 C.F.R. § 300.18(b)(2).

[174] Pub. L. No. 105–17, § 614(d)(1)(A)(vii)(II) (1997); *see also* 34 C.F.R. § 300.346(b) (1996).

[175] Caroline Dunn, "A Status Report on Transition Planning for Individuals with Learning Disabilities," *Journal of Learning Disabilities*, vol. 29, no. 1 (January 1996), pp. 23, 28. For example, the researcher cites several State initiatives including New Jersey which developed training workshops for different services providers; Iowa conducted different "train-the trainers" sessions, and educators in Wisconsin developed documents that address transition planning, the development of IEPs that incorporate transition services, vocational programs and transition information for parents. *See also* Gary M. Clark, "Transition Planning Assessment for Secondary-Level Students with Learning Disabilities," *Journal of Learning Disabilities*, vol. 29, no. 1 (January 1996), pp. 79–80, 85, 87–88; Diane S. Bassett and Tom E.C. Smith, "Transition in an Era of Reform," *Journal of Learning Disabilities*, vol. 29, no. 2 (March 1996), pp. 161, 164; Nancy M. Koroloff and Matthew J. Modrcin, *Transition Policies Affecting Services to Youth with Serious Emotional Disabilities: Youth in Transition Project* (Portland State University, Oregon: Research and Training Center on Family Support and Children's Mental Health; Rockville, MD: National Institute of Mental Health; Washington, DC: National Institute on Disability and Rehabilitation

programs designed to address specific disabilities or aspects of disability related needs. This study examined the transition policies and services for students identified as having serious emotional disturbance within 17 States.[176] This study found six categories of transition policies with variants in process, content, and implementation.[177] The categories may be described as follows:

- Four States, Maryland, Colorado, Kansas and New York, implement their procedures for providing transition services through the use of the student's individualized education plan (IEP) or a similar mechanism at the level of the local educational agency. Maryland, for example, requires local representatives within the State Department of Education to work cooperatively to develop transition plans for each child with a disability. These State policies place considerable emphasis on the preparation and transition of youth into employment opportunities. These policies generally developed pursuant to Public Law 98–199 (1983).[178]

- Three States, Maine, Massachusetts and Minnesota, created special committees to address transition-related issues including selecting and funding projects for statewide transition services. These committees have their own budgets, staff and supervisory responsibility. Maine, for example, established an interdepartmental committee on transition (authorized by the State's 1986 Transition Coordination Act). Maine's committee includes representatives from various State departments, parent and consumer groups, and service provider representatives. The committee in Maine is authorized to select and fund transition projects throughout the State and develop a statewide service delivery model.[179]

- Two States, Illinois and Washington, require a State plan on transition. For example, Washington's 1987 legislation required three State agencies to coordinate a plan for transition services. The plan these agencies developed sets a specific goal for achieving a higher percentage of special education students who attend college. The plan also addresses the need for transition services that will enhance these students' social and cultural lives in their communities.[180]

- One of the States examined, Delaware, established a separate program for providing transition services. The State established a residential facility to serve youth ages 18 to 21 identified as having serious emotional disabilities. These youth can receive special education services until the age of 22.[181]

- Five States, Alaska, Arizona, Massachusetts, Ohio, and Tennessee, have developed transition policies relying on interagency coordination of services to children, primarily through their child welfare systems. For example, Massachusetts' Agreement on Interagency Coordination for School-age Children establishes coordinated decisionmaking to meet the needs of all the State's school-aged children. The State's various agencies work together to develop plans for any school-aged child who is eligible for services through a human services

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Research, September 1989), Abstract and pp. 1–3 (ERIC Document ED 332 422).

[176] The States include Alabama, Alaska, Arizona, California, Colorado, Delaware, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, New York, Ohio, South Carolina, Tennessee, and Washington. Koroloff and Modrcin, *Transition Policies*, pp. 1–8.

[177] Ibid., p. 4.

[178] Ibid.

[179] Ibid., p. 5.

[180] Ibid., p. 6.

[181] Ibid.

agency. The agreement specifies procedures for assigning responsibilities and resolving disputes among agencies.[182]

- Two States, California and South Carolina, have sought to meet the transition needs of students identified as having serious emotional disabilities through the development of a comprehensive system of mental health services, of which transition services reflect a key component. South Carolina has established a State level policy council that conducts an annual needs assessment and makes recommendations for new services.[183]

As a result of this examination of State policies, the study identified nine components to the effective making of transition services. The study acknowledged that no current State policy encompasses all nine of the suggested ideals for transition.[184] Thus, although *some* transition programs and services are identified in research literature,[185] the studies discussed do not recommend or suggest the implementation nationwide of any particular transition policy, practice, service or program designed to prepare children with disabilities for adult life.[186]

In fact, educators and researchers during the 1990s have expanded the parameters of special education transition services to emphasize such important aspects of transition as employment experiences, introduction to independent living, vocational education, postsecondary education and services,[187] career counseling, community interaction, and the development of adult social skills.[188] Today educators view not only full-time employment but postsecondary education and service programs as primary indicators of effective transition options for students with disabilities.[189] Education researchers also have supported collaborative efforts by students, parents, secondary and postsecondary education personnel, social service agencies, and other entities in pursuing successful transition strategies.[190]

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[182] Ibid., pp. 6–7.

[183] Ibid., pp. 7–8.

[184] Ibid., p. 9. The nine components are: 1) interagency planning and coordination at the local level; 2) involvement of adult service agencies prior to the youth leaving the child service system; 3) a process for identifying or planning transition for the child at an early age; 4) transition should be "automatic;" 5) include a variety of settings for transition should be identified; 6) a person or system must have responsibility for planning and delivering services; 7) parents and youth should be included in the planning and implementation of the transition process; 8) the development of an interdepartmental mechanism to plan and coordinate transition services, as well as resolve disputes, and 9) include in transition services that created successful independent adult living.

[185] *See* Dunn, "A Status Report," pp. 23, 25–28. Some programs include vocational programs that are filled by individuals without disabilities, work-crew job training, on-the-job training, practical skill training such as filling out job and education applications, academic remedial courses, and independent living instruction. *See also* Julia Bulen and Michael Bullis, "Development of Transition Programs for Adolescents with Serious Emotional Disturbance," in *The Oregon Conference Monograph, vol. 7* (Monmouth, OR: Western Oregon State College, 1995; Washington, DC: U.S. Department of Education, Office of Special Education Programs, 1995), p. 5; Glenn McGrath, "Transitioning Students Identified as Seriously Emotionally Disturbed from High School to Adult Living; A Collaborative Project Between the West Hartford Board of Education and the State of Connecticut Social Service Agencies," paper presented at the Annual International Convention of the Council for Exceptional Children (Indianapolis, IN: April 5–9, 1995), pp. 1–11; Bassett and Smith, "Transition in an Era of Reform," p. 163; Matthew J. Modrcin et al., *Youth in Transition: A Description of Selected Transition Programs Serving Adolescents with Emotional Disabilities*, Youth in Transition Project (Portland State University, Oregon: Research and Training Center on Family Support and Children's Mental Health; Rockville, MD: National Institute of Mental Health; Washington, DC: National Institute on Disability and Rehabilitation Research, September 1989) (ERIC Document ED 332 421), pp. 1–164.

[186] Dunn, "A Status Report," p. 23. *See also* Bassett and Smith, "Transition in an Era of Reform," p. 163; F.R. Rusch, L. DeStefano, J. Chadsey-Rusch, L.A. Phelps and E. Szymanski, *Transition from School to Adult Life: Models, Linkages and Policy* (Sycamore, IL.: Sycamore, 1992) as cited in Paula D. Kohler and Frank R. Rusch, *Employment of Youths with Disabilities: Outcomes, Activities, and Indicators* (University of Illinois at Champaign: Transition Research Institute; Washington, DC: U.S. Department of Education, Office of Special Education Programs, 1994), p. 101; Koroloff and Modrcin, *Transition Policies*, p. 9.

[187] Support services at the postsecondary level are defined as those "generic" activities that are carried out to ensure equal opportunity for any student with a disability. Basic services, for example, services for the learning disabled, are mandated under section 504 (such as access to textbooks, tape recorders, and other assistance devices. L.C. Brinckerhoff, "Establishing Learning Disability Support Services with Minimal Resources," in M. Farrell, ed., *Support Services for Students with*

Transition services for students with disabilities participating in special education programs are necessary throughout elementary and secondary education. Beginning with the transition from early childhood education into elementary education, continuing with transitions from the resource room into the regular education classroom, through the final transition from secondary education to adult life, students in special education must progress through many different environments. These transitions, unless appropriately developed and implemented, can have serious adverse effects for the student while in school and for the person beyond into adult life.[191] Two

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Learning Disabilities in Higher Education: A Compendium of Readings (Columbus, OH: AHEAD, vol. 3, 1993), pp. 54–63; Loring C. Brinckerhoff, "Making the Transition to Higher Education: Opportunities for Student Empowerment," *Journal of Learning Disabilities*, vol. 29, no. 2 (March 1996), p. 127.

[188] *See* Bonnie Doren, Michael Bullis, and Michael Benz, "Predictors of Victimization Experiences of Adolescents with Disabilities in Transition," *Exceptional Children*, vol. 63, no. 1 (Fall 1996), p. 7 (hereafter cited as Doren et al., "Predictors of Victimization Experiences"); David F. Bateman, "A Survey of Transition Needs of Students with Behavior Disorders in the Midwest," in *Rural Goals 2000: Building Programs That Work; see RC 020 545*, Abstract, pp. 216–19 (ERIC Document ED 394 764). In this study, the researcher lists five main categories of problems for these students in post-school life: 1) lack of social skills whereby the students have difficulty following rules and authority; lack of self-awareness and responsibility whereby the students do not demonstrate motivation and goal-directed behavior; 3) lack of daily/functional skills whereby these students have difficulty with many aspects of independent living such as shopping, banking, and working; 4) lack of support whereby they lack family and community support, and 5) teaching barriers whereby they lack adequate materials to have the skills and knowledge to contact and obtain services from community and educational agencies; Roger C. Hoffman, "Transition. Chapter Six," in Greg A. Robinson et al., eds., *Best Practices in Mental Disabilities. Volume Two*; see EC 212 523 (1988), pp. 119–20 (ERIC Document ED 304 834). This 1988 study assessed the role of educators in transition services during the 1980s. It found that educators in only three States had responded to the transition requirements in the Federal legislation by enacting provisions in their law. It also discusses the initiatives in Iowa which included the State Education Agency, adult and youth service providers, and other organizations to explore different avenues and approaches to transition for students with mental disabilities. *See also* Michael Bullis and Robert Gaylord-Ross, "Moving On: Transitions for Youth with Behavioral Disorders. Working with Behavioral Disorders: CEC Mini-Library" (hereafter cited as Bullis and Gaylord-Ross, "Moving On") (Reston, VA: Council for Exceptional Children; Reston, VA: ERIC Clearinghouse on Handicapped and Gifted Children, 1991), pp. 1–64; Council of Chief State School Officers Resource Center on Educational Equity, "A Concern About . . . Connecting School-to-Career and Service Learning Initiatives," *Concerns*, issue 47 (August 1996), pp. 1–3; Elizabeth P. Aune and Janis M. Johnson, "Transition Takes Teamwork! A Collaboration Model for College-Bound Students with LD," *Intervention in School and Clinic*, vol. 27, no. 4 (March 1992), p. 222.

[189] Bullis and Gaylord-Ross, "Moving On," p. 39; Dunn, "A Status Report," p. 18. For example, researchers in the study advocate a variety of specific kinds of services determined by the needs, goals and heterogeneity of the students with learning disabilities. They support a "formal transfer" of these students into all aspects of adult life, whereby there is service and assistance during education in the secondary and postsecondary environment, providing educational and/or employment training. *See also* Elizabeth P. Aune and Janis M. Johnson, "Transition Takes Teamwork! A Collaborative Model for College-Bound Students with LD," *Intervention in School and Clinic*, vol. 27, no. 4 (March 1992), p. 222.

[190] *See* Loring C. Brinckerhoff, "Making the Transition to Higher Education: Opportunities for Student Empowerment," *Journal of Learning Disabilities*, vol. 29, no. 2 (March 1996), pp. 118, 120; Gary M. Clark, "Transition Planning Assessment for Secondary-Level Students with Learning Disabilities," *Journal of Learning Disabilities*, vol. 29, no. 1 (January 1996), p. 85.

[191] *See* Dennis A. deNomme, *Improving the Transition Process for Middle School Learning Disabled students Reentering the Regular Classroom through Student Accountability and Teacher Inservice Training* (Practicum Report, Nova Southeastern University, August 1994) (ERIC Document ED 378 736), pp. 20–25, 28–30 (hereafter cited as deNomme, *Improving the Transition Process*); Mary Wagner, "The School Programs and School Performance of Secondary Students Classified as Learning Disabled: Findings from the National Longitudinal Transition Study of Special Education Students," paper

of these transition periods, that from the resource room to the regular education classroom and that from high school to adult life are subjects of the discussions that follow.

Transition from Resource Room to Regular Classroom

The resource room is a structured school environment that often provides the central setting for the special education program. Generally, students are placed in the resource room setting to address their deficit areas and are "mainstreamed" into regular classroom instruction for studies not identified as deficit areas.[192] Thus, they spend part of their school day in the resource room and part in the regular classroom. Students who have conducted their studies in resource rooms, may, over a period of time, be placed in all regular classroom classes on a full-time schedule with continued monitoring by their former resource room teachers.[193]

Neither section 504 nor the IDEA contain specific provisions requiring schools to provide transition services for students with disabilities as they move to full-time instruction in the regular classroom. However, the educational literature indicates that such transition services may be necessary to ensure that such students are afforded equal educational opportunity. Review of the literature on transition services from the resource room to the regular education classroom reveals there have been a relatively small number of studies addressing this transition. However, education researchers who have reported on this transition have addressed such issues as methods for ensuring adequate transition services. Some of these studies have reported that the most serious barriers presented to special education students making this transition have been a lack of transition training and effective communication between the special education and regular education teachers involved in the transition and a lack of special assistance provided to transitioning students.[194] A 1994 study, for example, examined the transition of junior high students with learning disabilities from a resource room into regular classrooms.[195] The study identified six barriers to successful transition from resource rooms to regular classrooms. These included: 1) lack of adequate training for regular classroom teachers in serving students with learning disabilities; 2) regular teachers' negative attitude towards transitioned students; 3) teachers' attitude toward special education and use of resource rooms; 4) inadequate preparation of the students with learning disabilities to be moved into the regular classroom; 5) lack of communication between resource room teachers and regular teachers, and 6) inad-

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prepared for presentation at the Annual Meeting of the American Educational Research Association, Boston, MA, April 1990 (Menlo Park, CA: SRI International; Washington, DC: U.S. Department of Education, Office of Special Education Programs, 1990) (ERIC Document 316 015), p. 28 (hereafter cited as Wagner, "School Programs and School Performance").

[192] deNomme, *Improving the Transition Process*, p. 23; Wagner, "School Programs and School Performance," pp. 8–10.

[193] deNomme, *Improving the Transition Process*, p. 16.

[194] According to one study, successful transition from the resource room to the regular classroom is defined as a) students with disabilities have the basic skills and behavior required by the mainstream setting prior to entry, and b) the regular education teachers are familiar with the students' strengths and weaknesses and are confident that the children are prepared to perform adequately in their classrooms. Douglas Fuchs et al., *A Conservative Approach to Special Education Reform: Mainstreaming through Transenvironmental Programming and Curriculum-Based Measurement* (Bethesda, MD: National Institute of Child Health and Human Development; Washington, DC: U.S. Department of Education, Office of Special Education Programs, 1992) (ERIC Document ED 346 666), p. 21 I. *See* Nancy K. Glomb and Daniel P. Morgan, "Resource Room Teachers' Use of Strategies that Promote The Success of Handicapped Students in Regular Classrooms," *The Journal of Special Education*, vol. 25, no. 2 (1991), pp. 221–22; deNomme, *Improving the Transition Process*, pp. 25–28.

[195] deNomme, *Improving the Transition Process*, pp. 10–13. The study was done in a small rural school district in the southwestern United States. At the junior high level, special education functions in a resource room. During the time of the study, the resource room had one full-time special education teacher certified in emotionally handicapped and learning disabled. Each of the 14 students enrolled in the resource room (grades 6 through 8) attended the resource room daily for mathematics, reading or language, or any combination of the three areas depending on the deficiency. Ibid.

equate inservice training for special education transition.[196]

The study found that the academic needs of the students were not being met in regular classrooms. Students in transition to regular classrooms showed poor study habits, displayed inappropriate behavior, had poor social skills, and experienced low academic achievement.[197] The study indicated that the majority of the students in transition failed because their academic and behavioral needs were not being met appropriately in the new environment of a regular classroom.[198]

The study also showed that when inservice training was provided to the regular education teachers, the communication between regular classroom teachers and the resource room teacher improved, the regular classroom teachers' understanding of the special education program improved, and student accountability and performance increased.[199] The study's recommendations urge school districts to broaden special education inservice training to include regular classroom teachers.[200]

A 1992 study reported on the transition of 42 pupils with mild and moderate disabilities out of mathematics instruction in special education resource rooms into regular education mathematics.[201] The study identified some indicators for the successful transition of the students into regular classrooms.[202] The study found that one of the major indicators for any successful transition of students into regular classrooms is the involvement or interaction of all staff, including the regular and resource teachers, in the transition process. As a result of the interaction, usually through regular meetings, the special and regular educators rated this particular transition project as a positive initiative.[203]

Another study indicated that a barrier to successful transition from a resource room to a regular classroom was a lack of special assistance provided to students making the transition. This 1990 study examined the transition of students identified as having a learning disability in the 1985–1986 school year.[204] This study addressed three issues: 1) the characteristics of the students; 2) the programs and services provided for the students, and 3) the extent to which these students received instruction in regular education classrooms.[205] The data on the mainstreaming or transition of students into regular classrooms showed that the majority of the secondary students identified as having learning disabilities were held to the same grading standard as nondisabled students. However, generally, the students were not provided with services, such as tutoring assistance, in order to meet the academic expectations.[206]

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[196] Ibid., pp. 22–24.

[197] Ibid., p. 16.

[198] Ibid., pp. 16, 19–20. The study reveals several reasons why the academic and behavioral needs of the students were not being met in the regular classroom during the transition process. One reason was that the all of the junior high teachers surveyed had a "low preference towards having learning disabled students in their classrooms." Most of the teachers reported that they did not understand the "unique academic and social needs" of these students. The teachers also revealed that they had little preparation to teach students with learning disabilities.

[199] Ibid., pp. 70–72.

[200] Ibid., pp. 72–73.

[201] Fuchs et al., *A Conservative Approach*.

[202] Some of the indicators are constant testing of the special education students in the regular and special education environment, explicit formulae rather than personal judgment in choosing students for transition, and the instruction of certain skills in mathematics, such as problem solving, to the students. Ibid., pp. 31–32.

[203] Ibid., p. 32

[204] The researcher examined the educational programs and services provided to secondary students classified as learning disabled as part of the National Transition Study of Special Education Students (NLTS). Wagner, "School Programs and School Performance," p. 2.

[205] Ibid.

Transition from High School to Postsecondary Education or Employment

Transition services for students with disabilities finishing their secondary education and moving into college or the work world has been the focus of widespread attention among educators, researchers, and policymakers. Federal policymakers have made these transition services a priority.[207] The U.S. Department of Education, Office of Special Education Programs and Rehabilitative Services, in the document "Programming for the Transition of Youth with Disabilities: Bridges from School to Working Life" defined transition upon high school graduation as follows:

> [t]he transition from school to working life is an outcome-oriented process encompassing a broad array of services and experiences that lead to employment. Transition is a period that includes high school, the point of graduation, additional postsecondary education or adult services, and the initial years of employment. Transition is a bridge between the security and structure offered by the school and the opportunities and risks of adult life. Any bridge requires both a solid span and a secure foundation at either end. The transition from school to work and adult life requires sound preparation in the secondary school, adequate support at the point of school leaving, and secure opportunities and services, if needed, in adult situations.[208]

In keeping with this Department of Education initiative, by the time students reach age 16, each student's IEP must include a statement that describes how in-school instruction, work experience and employment, independent living skill training, and vocational evaluation will be used to ensure positive transition outcomes for each student.[209] One commentator recently has stated that:

> [f]rom a student's first IEP goal until his or her graduation or aging-out of special education, parents and service providers must continually ask about how the achievement of any given goal will ultimately assist the student in thinking more critically and acting more independently.[210]

In addition, a review of education literature on transition services reveals that special education researchers have focused heavily on addressing the continuing need for better transition services from high school into postsecondary education or the school-to-work transition.[211]

Despite the development of important Federal initiatives by the Department of Education and legislation such as the Americans with Disabilities Act and the IDEA, numerous studies indicate that large numbers of individuals with disabilities remain unemployed and socially isolated within their communities.[212] Researchers continue to study students identified as having disabilities to determine the difficulties they may encounter in making a transition from secondary education settings to postsecondary education or the work world.[213] Some of these studies show, for example, that individuals with learning disabilities continue to experience higher rates and longer periods of unemployment, underemployment, or part-time employment than their peers who do not have disabilities.[214] Frequent problems for students identified as having learning disabilities include difficulty with academics, with establishing social and interpersonal relationships, and in carrying out independent living functions.[215]

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[206] Ibid., p. 27.

[207] *See generally* Doren et al., "Predictors of Victimization Experiences," p. 7; Roger C. Hoffman, "Transition," in Greg A. Robinsin et al., eds., "Best Practices in Mental Disabilities, Volume Two," *see* EC 212 523 (1988), pp. 115–17 (ERIC Document 304 834); Dunn, "A Status Report," p. 17.

[208] Edward M. Levinson, "Best Practices in Transition Services," in Alex Thomas and Jeff Grimes, eds., *Best Practices in School Psychology. III* (Washington, DC: National Association of School Psychologists, 1995), p. 910.

[209] Craig A. Michaels, ed., *Transition Strategies for Persons with Learning Disabilities* (San Diego, CA: Singular Publishing Group, Inc., 1994), p. 48.

[210] Ibid.

[211] *See* Kohler and Rusch, *Employment of Youths with Disabilities*, pp. 9, 101, 106. The monograph includes four chapters on transition from secondary education to employment of youth with disabilities. It discusses 42 model demonstration projects on employment initiatives for children with disabilities, and the researchers identified a comprehensive list of 17 outcomes and 51 measures believed to be important in promoting employment of youths with disabilities. Bullis and Gaylord-Ross, "Moving On," p. 4; Dunn, "A Status Report," p. 18.

In addressing the transition from high school to the adult world, there are certain skill areas that reflect crucial aspects that must be included in a transition plan. These may be divided into three specific areas: daily living skills, personal or social skills, and occupational or vocational skills.[216] The daily living skills that are necessary for independent living include managing finances, maintaining a home, caring for personal needs, buying and preparing food, buying clothes, and being mobile within the community.[217] Personal or social skills include maintaining hygiene and appearance, appropriate interpersonal skills, appropriate problem-solving skills, and adequate communication skills.[218] Occupational or vocational skills include exhibiting appropriate work habits and behaviors, possessing marketable vocational skills, and exhibiting appropriate job-seeking skills.[219] All of these areas must be addressed in developing appropriate transition plans and services for students with disabilities to best serve their needs.

Transition from High School to Postsecondary Education

In developing services and plans for the transition of students from high school to postsecondary education, educators must assist students with disabilities in undertaking a number of new and challenging initiatives. For example, many students with learning disabilities need guidance on how to find a postsecondary education program that is suitable to their unique needs. Once these students are admitted to a college program, they may require assistance in developing and maintaining study skills and meeting other necessary qualifications to complete the program successfully.[220] For example, a 1996 study reported research data that showed a low percentage of students with learning disabilities attending college.[221] This study notes that students with learning disabilities pursued postsecondary education at one-fourth the rate of students without disabilities, tended to drop out of higher education institutions at a higher rate than students without disabilities, or tended to delay entrance

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[212] Council for Exceptional Children, "Building Consensus From Transition Experts on Social Integration," *Outcomes and Interventions*, vol. 62, no. 2 (October 1995), p. 165.

[213] *See* Dunn, "A Status Report," pp. 79–80; Bassett and Smith, "Transition in an Era of Reform," pp. 161, 165.

[214] *See* Dunn, "A Status Report," p. 17.

[215] *See* ibid., pp. 18–19.

[216] Levinson, "Best Practices," p. 911.

[217] Ibid.

[218] Ibid.

[219] Ibid.

[220] *See* Loring C. Brinckerhoff, "Making the Transition to Higher Education: Opportunities for Student Empowerment," *Journal of Learning Disabilities*, vol. 29, no. 2 (March 1996), p. 127. The kind of services include instruction on how to use college resource guides and computer software to assist them in the college search process, and how to apply for admission, financial aid, and housing assistance.

[221] Aune and Friehe, "Transition to Postsecondary Education," pp. 1–22.

to college in comparison to students without disabilities.[222]

In a position paper on students identified as having learning disabilities, one researcher reported that many of these students do not consider postsecondary education because they are not encouraged or prepared for attending college while in high school.[223] According to this paper, transition planning requires programs that will enhance the student's understanding of his or her learning disability, and of the new role, responsibilities, needs, and services that admission to a college may require.[224] In addition, this researcher states that successful secondary to postsecondary transition for students with disabilities requires their participation and involvement in the decisionmaking process, the involvement of parents and educators in the transition and the development of skills in networking with postsecondary personnel and external support services.[225]

A 1991 study examining the transition of students with learning disabilities from high school to college addressed similar issues.[226] The study identified four transition components that are essential for preparing students with disabilities for postsecondary education. The study focuses, in particular, on the need for transition services to help students entering postsecondary education understand the implications of their changed legal status of no longer being eligible for services under the IDEA, but being covered only by section 504. The study identifies four areas in which students need transition assistance to ensure that they are afforded equal educational opportunity in postsecondary education.[227]

The first area is finding the appropriate college program, including identifying and seeking admission to institutions that provide appropriate programs, services and accommodations. For students to select the appropriate college program, they must receive assistance that helps them know their personal strengths, weaknesses, needs, and goals, and to research the environment they will be entering in the college setting.[228]

The second area is student understanding of the legal term "otherwise qualified." As defined under section 504, an "otherwise qualified individual" must be able to meet essential program or course requirements when provided with reasonable accommodation. For students to become effective advocates for their civil rights in postsecondary institutions, they must be provided with an understanding of the concept of reasonable accommodation and related issues, such as identifying circumstances in which it may be applied. A fundamental problem here has been that transition programs and services do not always address the needs of students with learning disabilities to understand their rights and responsibilities under the law.[229]

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[222] *See* C. Henderson, *College Freshmen with Disabilities: A Statistical Profile* (Washington, DC: American Council on Education, HEATH Resource Center, 1992); M. Wagner, R. D'Amico, C. Marder, L. Newman, and J. Blackorby, *What Happens Next: Trends in Postschool Outcomes of Youth with Disabilities*, Second Report from the National Longitudinal Transition Study of Special Education Students (Menlo Park, CA: SRI International, 1992); Aune and Friehe, "Transition to Postsecondary Education," p. 4. *See also* Ruth E. Moccia, Jean B. Schumacher, J. Stephen Hazel, D. Sue Vernon and Donald D. Deshler, "A Mentor Program for Facilitating the Life Transitions of Individuals Who Have Handicapping Conditions," *Reading, Writing and Learning Disabilities*, vol. 5 (1989), pp. 177–78 (hereafter cited as Moccia et al., "A Mentor Program").

[223] Katherine G. Butler, "A Position Paper of the National Joint Committee on Learning Disabilities: January 1994," *Topics in Language Disorders* (May 1996), p. 69.

[224] Ibid., p. 70.

[225] Ibid., pp. 70–73.

[226] Sally S. Scott, "A Change in Legal Status: An Overlooked Dimension in the Transition to Higher Education," *Journal of Learning Disabilities*, vol. 24, no. 8 (October 1991), pp. 459–66 (hereafter cited as Scott, "A Change in Legal Status").

[227] *See* ibid., pp. 460–65.

[228] Ibid., pp. 460–61.

The third area is attaining accommodation. To do this, students must know what services are available to them. It is the student's obligation to inform the institution of his or her need for academic adjustments and auxiliary aids. It is the school's responsibility to modify its academic requirements where appropriate and to provide the appropriate auxiliary aids.[230] To be effective in ensuring accommodation, students with learning disabilities may need training in communication skills to alert college staff and faculty to their needs. In addition, once accommodation is attained, students with learning disabilities must monitor their own academic performance to ensure that the accommodations they are given are necessary and sufficient to meet their needs. Most students with learning disabilities have been guided by IEP goals, and have had minimal involvement in academic decisionmaking. They usually are not prepared to monitor or evaluate the effectiveness of the accommodation or their school progress.[231]

The fourth area is the establishment of a personal support network with special educators, teachers, and counselors. Transition programs can assist students with learning disabilities to identify and develop their own support network. In postsecondary institutions, students with disabilities must investigate campus resources and make contact with advisors and instructors.[232]

The study also discussed the need for early postsecondary transition planning, beginning during the freshman year of high school, to prepare students with disabilities for successful postsecondary education.[233] Because students with disabilities experience a dramatic shift in their rights and responsibilities, transition from secondary to postsecondary education institutions needs to be comprehensive in preparing students for their new roles and responsibilities.[234]

Transition from High School to Employment

Other research on students with disabilities after high school graduation deals with the school-to-work transition. For the most part, these studies have identified employment for high school graduate students with disabilities as a desirable or successful transition.[235] However, research findings show numerous problems encountered by students with various disabilities in their transition from public secondary education to adult life, particularly into the employment environment.[236] For example, some studies on the transition of students with serious emotional and behavioral disorders show that these youth often do not enroll in postsecondary education programs, experience a high rate of unemployment or underemployment and job dissatisfaction, a lack of success in employment settings, and receive little assistance from community agencies upon leaving public school.[237] Three researchers collected data from a sample of adolescent students with serious emotional disturbance in two western States. The researchers concluded that for students with disabilities to avoid being victimized, such as by violent crime, these subjects required training in the development of community-based social skills.[238]

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[229] Ibid., pp. 461–62.

[230] *See* DOEd, Office of the General Counsel, Affected Agency Review Response to U.S. Commission on Civil Rights, *Equal Educational Opportunity and Nondiscrimination for Students with Mental Retardation, Learning Disabilities, Behavioral Disabilities, and Serious Emotional Disturbance: Federal Enforcement of Section 504* (draft), (May 22, 1997), chap. 9, item 13, p. 29.

[231] Ibid., p. 462.

[232] Ibid., p. 463.

[233] *See* Scott, "A Change in Legal Status," p. 463.

[234] Ibid., p. 465.

[235] *See, e.g.*, Kohler and Rusch, *Employment of Youths with Disabilities*, p. 101.

[236] *See* E. Edgar, "Employment as an Outcome for Mildly Handicapped Students: Current Status and Future Directions," *Focus on Exceptional Children*, vol. 21, no. 1 (1988), pp. 1–8, E. Edgar and P. Levine, "Special Education Students in Transition 1976–1986," unpublished manuscript (Seattle, WA: University of Washington, 1987) and A.S. Halpern, "Transition: A Look at the Foundations," *Exceptional Children*, vol. 51 (1985), pp. 479–86 as cited in Burris and Gaylord-Ross, "Moving On," pp. 4–5; Moccia et al., "A Mentor Program," p. 178.

One study of transition services from high school to adult life involved students with serious emotional disturbances in the West Hartford, Connecticut, school district.[239] This study addressed a variety of counseling services such as vocational, educational, family, and psychological initiatives, referrals to different social service agencies, and job placement services.[240] Another study described the necessary system of transition for children with serious emotional disturbance.[241] The researchers examined 53 transition programs nationwide and concluded that any transition process should be viewed as progressive, developmental, and to assist the child in assuming adult role responsibilities.[242] The study clustered the programs into five categories and found that most students with severe emotional disorders received a diverse range of programs, including career education and vocational training, job placement, independent living skills, and supervised apartment living. The study found that many of the programs were replicated in various forms, and that the majority of the transition services address skills necessary for independent living in the community. However, less than one-half of the programs offered any followup services once youth are discharged from the programs, and most funding for services stopped when the adolescent turned 18.[243]

A review of the literature on transitional services for students identified as having a behavioral disability shows that these students often require comprehensive post-public secondary school programs that provide vocational and social skills training, as well as community services to assist them in adjusting to adult life, particularly to full-time employment.[244] Studies on the transition of students identified as having either serious emotional disturbance or a behavior disability in the Midwest indicated that these students often suffered from a lack of social skills, vocational preparation, and independent living skills.[245] Suggested components of effective transition programs for these students included high school programs designed to assist them in preparing for independent living and jobs in the community and in gaining access to schools and adult service agencies to meet special needs.[246]

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[237] *See* Bulen and Bullis, "Development of Transition Programs," p. 2; McGrath, "Transitioning Students Identified as Seriously Emotionally Disturbed," p. 4; M. Pullis, "No Bridges over Troubled Waters: Transition Services for Students with Emotional/Behavioral Disorders," *Missouri Lincletter*, vol. 14, no. 2 (1991), pp. 1–4, M. Bullis and G. Ross, *Readings in Ecosocial Development* (San Francisco, CA: San Francisco State University, 1990) (ERIC Document ED 327 990) and P. Wehman, "Applications for Youth with Behavior Disorders," in P. Wehman, ed., *Life Beyond the Classroom: Transition Strategies for Young People with Disabilities* (Baltimore, MD: Paul H. Brookes Publishers, 1992), pp. 357–72 as cited in Bateman, "A Survey of Transition Needs," p. 214; Alan R. Frank, Patricia L. Sitlington, and Rori Carson, "Transition of Adolescents with Behavioral Disorders," *Behavioral Disorders*, vol. 16, no. 3 (May 1991), p. 180; Moccia et al., "A Mentor Program," p. 177.

[238] Doren et al., "Predictors of Victimization Experiences," pp. 16–17.

[239] McGrath, "Transitioning Students Identified as Seriously Emotionally Disturbed," pp. 1–11.

[240] Ibid., p. 6.

[241] Modrcin et al., *Youth in Transition*, pp. 1–163.

[242] Ibid., p. 2.

[243] Ibid., p. 5.

[244] Bullis and Gaylord-Ross, "Moving On," pp. 7–11, 23, 39–41. *See also* Bulen and Bullis, "Development of Transition Programs," p. 5. These researchers indicate that most of these students tend not to go to college after high school, but leave public school with the objective of finding employment and living independently. They advocate that transition services begin during the secondary school years which emphasize "functional skills" such as balancing a checkbook or completing a job application.

[245] Bateman, "A Survey of Transition Needs." *See also* Bulen and Bullis, "Development of Transition Programs," p. 5; Alan R.

State and Local Initiatives in Transition Services

States and local communities are attempting to meet the transition needs of students with and without disabilities.[247] The U.S. Commission on Civil Rights studied several local school districts that have included transition in the overall planning and services for all students, particularly those with disabilities. In the Charlotte-Mecklenburg Schools in Charlotte, North Carolina, the successful transition of students with disabilities into the community is an integral component of the overall educational program. The State of North Carolina requires transition to be a component of the IEP and address a student's need to make a successful transition after high school.[248] The transition team must include members of the IEP committee, including a school representative, such as the guidance counselor, the student's regular and special education teachers, the parents or guardian of the student, and a representative from a service provider that will be responsible for providing or paying for transition services.[249] The school district follows the State of North Carolina's procedural manual that specifies the responsibilities of the key transition team members and the content of the transition component of the IEP plan.[250] There also is a followup component in the transitional process; the transition component of the IEP plan must be reviewed at least annually for effectiveness in meeting the student's needs.[251]

Other school districts also include transition as a component in overall school programs for students with disabilities. In Albuquerque, New Mexico, transition planning is part of the IEP process for high school students. A transition plan is developed by the IEP committee prior to the student's 16th birthday, and aims to promote successful transition of the student from high school to employment and independence in the community.[252] In St. Marys County, Maryland, transition is one of the objectives in the district's special education program.[253] The objective is to provide

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Frank, Patricia L. Sitlington, and Rori Carson, "Transition of Adolescents with Behavioral Disorders—Is It Successful?" *Behavior Disorders*, vol. 16, no. 3 (May 1991), pp. 180–90.

[246] Bateman, "A Survey of Transition Needs," p. 216.

[247] Benz et al., "School-To-Work Components That Predict Postschool Success," p. 152.

[248] *See* State of North Carolina, State Department of Public Instruction, Division of Exceptional Children's Services, *Procedures Governing Programs and Services for Children with Special Needs* (1993 edition), p. 14. The North Carolina State procedures for special education define transition as "a coordinated set of activities for a student, designed within an outcome-oriented process, which promote movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experiences, and development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation." Ibid.

[249] Ibid., p. 46.

[250] Ibid., p. 47. The transition plan should include the following components: a statement of needed transition services; a statement of interagency responsibility for financing the student's transitional services, and a statement whereby a participating agency, other than the public agency responsible for the student's education, fails to provide the agreed upon transition services, the primary education public agency must reconvene a meeting of the IEP committee to identify alternative strategies to meet the transition objectives. Ibid.

[251] Charlotte-Mecklenburg Schools, *Exceptional Children: The Administrator's Handbook for Self-Contained Programs and Services* (March 1996), pp. 83, 97.

[252] Albuquerque Public Schools, *Parent Handbook: Special Education Services in APS*, p. 10.

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for the successful transition of students with disabilities from school into the adult world. The objective serves as guidance for the schools' special education staff in addressing the educational needs of students with disabilities, provide the instructional programs and services offered, and involve the appropriate faculty or staff in the transitional process.[254] In Prince Georges County, Maryland, successful transition for all students is one of the objectives stated in the schools' guidance program.[255]

Unfortunately, there is very little data on the impact of these and other efforts on the transition of students with disabilities into adult life.[256] However, the inclusion of transition in the overall educational planning and, in particular, in the special education program at the local level suggests that it is viewed as an important indicator of a student's success during and after public school education.

Transition Services: OCR's Enforcement Efforts

In addressing schools' legal obligation to provide transition services for students identified as having disabilities, OCR implements section 504 in part through the section's regulatory provisions. However, there are no provisions in the section 504 regulations that explicitly refer to the term "transition," although the regulations do mention such related issues as program accessibility in the context of entering postsecondary education programs.[257] Thus, the section 504 regulations do not explicitly address whether students with disabilities have a right to transition services under section 504. However, if deemed a requirement for the student to receive FAPE, then transition services are required under that law.

Case law has helped to clarify the implementation of section 504. For instance, in 1994, the U.S. District Court in Colorado ruled that a school district did not violate section 504 in providing educational and transitional services for a 19-year-old student from a separate resource center and not the neighborhood school. The parents requested that the district provide a new IEP which would allow the student to have all of his services at the neighborhood school and to identify the student's post-school environment. The court ruled that the location of services and post-school environment were properly left to a determination of the IEP staffing team.[258] In 1996, the U.S. Court of Appeals for the Tenth Circuit upheld the

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[253] St. Marys County Public Schools, *Special Education Administration Handbook*, ch. I, p. I–2.

[254] Ibid.

[255] Prince Georges County Public Schools, Division of Pupil Services, Guidance Department, untitled paper (no date), provided as part of Jerome Clark, Superintendent of Schools, Prince Georges County Public Schools, Response to U.S. Commission on Civil Rights Information Request, Feb. 29, 1996, Q. 19.

[256] *See* S.P. Choy, M.N. Alt and R.R. Henke, "Profile of the Target Populations for the School-to-Work Transition Initiatives," in U.S. Department of Education, *School-to Work: What Does Research Say About It?* (Washington, DC: U.S. Government Printing Office, 1994) (ERIC Document ED 371 206) as cited in Benz et al., "School-to-Work Components That Predict Postschool Success," p. 152.

[257] 34 C.F.R. Ch. 1, Subpart C, § 104.22 (a) and subpt. E, §§. 104.41–47 (1996). *See also* Aune and Friehe, "Transition to Postsecondary Education," p. 2.

The section 504 regulations require postsecondary education institutions to make their programs accessible to students with disabilities, not to discriminate in admissions, recruitment or treatment, or in academic requirements for these students. In addition, the regulations require that postsecondary institutions must provide "comparable, convenient and accessible" housing to students with disabilities. 34 C.F.R. Ch. 1, Subpart E, §§ 104.42–104.45 (1996); *see also* Aune and Friehe, "Transition to Postsecondary Education," p. 2.

The regulations under admissions and recruitment prohibit postsecondary institutions from using any test or criterion for admission that has an adverse effect on students with disabilities. 34 C.F.R. Ch. 1, subpt. E, § 104.42 (1995). The regulations regarding academic adjustments include modifications to academic requirements "as necessary" so that the programs do not discriminate or have the effect of discriminating against qualified students with a disability and the use of auxiliary aids for students with impaired sensory, manual, or speaking skills. 34 C.F.R., Ch. 1, Subpart E, § 104.44 (1996).

district court's ruling and decided that the student had no greater rights under section 504.[259]

There is no OCR policy guidance addressing the transition of students identified as having disabilities from high school to postsecondary education or the work world. The compliance standards on which OCR relies in enforcing section 504 largely are developed on a case-by-case analysis of issues relating to transition services. In conducting its enforcement activity, OCR has addressed a relatively small number of transition related issues.

In one such case, OCR investigated a complaint against the Fitchburg school district in Worchester, Massachusetts. One of the allegations in the complaint stated that the high school was graduating an 18-year-old student with a disability who had not received vocational assessment or counseling. Thus, the complaint indicated that the school had not sufficiently prepared the student to make the transition from high school to the work world. Here, OCR ruled that the school was in violation of section 504 for failing to provide adequate transition services. In finding for the complainant, OCR required the school district to take affirmative measures to compensate for the lack of transition services. Among its findings in the Fitchburg case, OCR noted that the minimal vocational training received by the student was not specific to her individual needs. In addition, OCR found that the school district had failed to provide, or delayed services to which the student was entitled.[260] Since OCR's finding, the school district has developed a program to ease the transition from school to work for students identified as having a disability.[261]

In 1994, OCR reviewed a complaint against a Tennessee school district in which the complainants alleged that the school district had failed to provide their child with transitional services after graduation.[262] OCR did not investigate the allegations regarding transition, because they were addressed in an administrative complaint filed with the Tennessee State Department of Education. However, the OCR case letter noted that the school district had developed and implemented a transition plan for the student. The transition plan included placement of the student with local businesses. OCR determined, based on its investigation, that the school district's actions met with section 504's regulatory requirements.[263]

Also in 1994, OCR reviewed a complaint against a Washington State school district in which the parents of a student with a disability alleged that their child's IEP did not contain any mention of vocational education or services.[264] However, the IEP did refer to the student's vocational assessment and a transition plan. The transition plan established goals for improving keyboard skills and volunteer experience. Under the plan, the student's keyboard skills improved, and OCR found no evidence that the district failed to provide adequate transitional services.[265]

More recently, in 1996, OCR investigated a complaint in which the complainants, who had moved from an Alabama school district to one in Georgia, were dissatisfied with the transitional services (from resource room to regular class-

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[258] *See* Urban v. Jefferson County School District R–1, No. 93–S–908 (1994) as cited in 21 IDELR 985 (1995).

[259] *See* Urban v. Jefferson County School District R–1, No. 95–111 (10th Cir. 1996) as cited in 24 IDELR 465 (1996).

[260] *Sunday Telegram*, Worchester, MA, Sept. 15, 1996, p. B–3.

[261] Ibid.

[262] Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Elam Carlton, Superintendent, Rutherford County School District, Murfreesboro, TN, re: Complaint No. 04–94–1331, Sept. 29, 1994, p. 1 (hereafter cited as Meyer letter re: OCR Complaint No 04–94–1331).

[263] Ibid., p. 2.

[264] Gary D. Jackson, Regional Civil Rights Director, OCR, Region X, DOEd, letter to Gordon L. Dolman, Superintendent, Blaine School District No. 503, Blaine, WA, re: Complaint No. 10–94–1090, Jan. 26, 1995, *reprinted in* 22 IDELR 515.

[265] Ibid., p. 515.

room) provided for their child under the Georgia school district's proposed IEP.[266] However, OCR determined that the Georgia school district met the due process requirements of the regulation implementing section 504, and that the district's standards and procedures met the requirements of section 504 and, consequently, OCR closed the case.[267]

The failure of OCR to create policy guidance in the right to transition services under section 504 and the silence of the section 504 regulations on transition are likely to lead to inconsistent decisions by courts and by OCR. Therefore, the development of regulations and policies on this issue could improve OCR's compliance and enforcement efforts related to transition services.

Maximizing Potential—Counseling

Educational Perspectives and Policy

The provision of counseling services is an essential element of educational programs designed to promote the goals of educational excellence, equity, and equal access. These services often are critical in shaping students' plans for their futures. Counseling services may consist of a wide variety of components such as academic preparation and planning, mental health, interpersonal relations, social adjustment, career planning, and work adjustment.[268] This range of services, properly designed and implemented, can accommodate the unique developmental needs of students identified as having mental retardation, a learning disability, serious emotional disturbance, or a behavioral disability. Through the delivery of appropriate counseling services, counselors can play a significant role in maximizing the individual potentials of students with these disabilities.

Federal law and policy have recognized the importance of counseling students with disabilities by incorporating provisions in law and regulations. For example, counseling services are addressed in the section 504 regulations. The section 504 regulations consider counseling services as "related aids and services" that may be associated with the provision of a free appropriate education. Under the section 504 regulations, related aids and services must be designed to meet the educational needs of individuals with disabilities as adequately as the needs of nondisabled individuals and to adhere to certain procedures.[269]

The section 504 regulations also require that a recipient elementary or secondary school providing personal, academic, or vocational counseling, guidance, or placement services to its students provide these services without discrimination on the basis of disability.[270] The regulations clearly indicate that schools are prohibited from counseling students with disabilities toward career objectives more restrictive than nondisabled students with similar interests and abilities are counseled to pursue.[271] These provisions support the belief that students with disabilities should be counseled to maximize their abilities and to become productive citizens.

The regulations' provisions relating to counseling are particularly significant. In its draft resource guidance on counseling, OCR states, "[c]ounselors and counseling services are offered by secondary schools and colleges to help students attain their fullest potential academically and socially."[272] Moreover, in recognition of a number of barriers that limit the opportunities of students with disabilities, OCR notes that counseling services can improve and expand the service delivery that helps to alleviate the effects of these barriers.[273] OCR states: "[t]his means that counselors need to have an understanding of how to recognize discrimination and other barriers to equal educational opportunity before they can take the appropriate steps to enable all students to develop to their fullest."[274]

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[266] Archie B. Meyer, Sr., Regional Civil Rights Director, OCR, Region IV, DOEd, letter to Kathryn M. Shehane, Superintendent, Douglas County School District, Douglasville, GA, re: Complaint No. 04–95–1567, Feb. 13, 1996, p. 4 (hereafter cited as Meyer letter re: OCR Complaint No. 04–95–1567).

[267] Ibid., p. 5.

[268] DOEd, OCR, "The Guidance Counselor's Role in Ensuring Equal Educational Opportunity" (OCR pamphlet ED/OCR 91–26R).

[269] 34 C.F.R. § 104.33(b)(1) (1996).

[270] *Id.* § 104.37(b).

[271] *Id.* § 104.37(b).

The Counselor's Role

Students with mental retardation, learning disabilities, serious emotional disturbance, or behavioral disabilities can present many challenges for their counselors. For these students, appropriate counseling may entail addressing needs and providing services that are more intense than those of regular education students. For example, students identified as having learning disabilities are much more likely to suffer from lower self-concept and self-esteem than their peers in regular education.[275] In addition, different counseling strategies may be necessary depending on the nature of the student's disability. For example, for students identified as having serious emotional disturbance, traditional methods of counseling such as talk therapy are not as effective as they are with other students.[276] In the case of the ADHD student, additional parental counseling may be needed because of the strains this disorder places on the family.[277]

Often, though, students with mental retardation, learning disabilities, serious emotional disturbance, or behavior disabilities are not provided the counseling services they require. A review of education literature reveals serious concerns among those in the education community, including parents, staff, and students themselves, about the delivery of counseling services to students with these and other disabilities. Some reports and studies indicate that students identified as having disabilities are among those who are most often underserved by counselors.[278] In the case of students with emotional or behavioral disorders, some schools have denied students psychological and counseling services.[279]

Other studies have suggested a number of reasons for this poor delivery system. Factors contributing to the lack of adequate counseling services for students with disabilities may include: (1) counselors who are ill-equipped to address the differing needs students with these disabilities and regular education students; (2) a lack of time

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[272] DOEd, OCR, "Counseling," Resource Guide Collection Section 627, Mar. 20, 1996, p. 1.

[273] Ibid.

[274] Ibid.

[275] Jerry Guindon, *Enhancing the Self-Concept and Self-Esteem of Upper Elementary Grade Students with Learning Disabilities Through Counseling, Modeling, Reverse-Role Tutoring, and Parent and Teacher Education*, Practicum Report, Nova University, Aug. 4, 1993; Miller et al., "Variables Related to the Decision of Young Adults with Learning Disabilities."

[276] Lou Denti and John Liderbach-Vega, *Bridging The Gap Between Regular & Special Education: Adventure-Based Counseling For Students With Emotional Disturbances In Public Schools* (1992).

[277] Donna Barefoot and George Thomas, "Effects of Seminar Participation on Parental Attitude Concerning the Use of the School Counselor as a Resource," paper presented at the Annual meeting of the Mid-South Educational Research Association, November 1994, p. 2.

[278] Jamie Satcher and Katherine Dooley-Dickey, "College and the LD Student: Where Does the School Counselor Fit In?" paper presented at the Annual Convention of the American Association for Counseling and Development, Apr. 21–24, 1991; Miller et al., "Variables Related to the Decision of Young Adults with Learning Disabilities."

[279] A 1994 article cites a gap in services needed and services received by students with disabilities at the secondary school level. Only 31 percent of youth with emotional disturbances received personal counseling through their schools, and these youths had the highest dropout rate, 55 percent, for all youth with disabilities. Charles N. Oberg, Nicholas A. Bryant, and Marilyn L. Bach, "Ethics, Values, and Policy Decisions for Children With Disabilities: What are the Costs of Political Correctness?" *Journal of School Health*, vol. 64 (August 1994), p. 223.

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and resources; and (3) inadequate counselor training and education regarding these disabilities. Providing counseling services to students with these disabilities can require a great deal more time than required for other students.[280] Counseling students with these disabilities may require extra efforts such as parental consultation, collaborative efforts with special and regular education teachers, or communication with agencies and organizations outside the school.[281] One study indicates that unduly high student-to-counselor ratios and growing diversity in student population can place additional demands on the counselor's time and resources.[282]

Some preliminary requirements for adequate counseling services may be discerned from the literature. As an initial matter, providing appropriate counseling services to students identified as having mental retardation, learning disabilities, serious emotional disturbance, or behavioral disabilities requires counselors who possess specialized knowledge, skills, and abilities. For example, the counselor's ability to determine accurately the needs of each student is a crucial first step in developing a successful counseling relationship with that student. In addition, the counselor must possess knowledge of strategies that can adequately address the student's needs. Just as in the case of teachers and other school staff, the counselor also must possess knowledge of legal requirements under section 504, the IDEA, and State laws and policies to provide counseling services that are nondiscriminatory to students with these disabilities. Finally, the counselor must possess the skills necessary to provide access to counseling services equally between regular education students and special education students.[283]

The counselor's role is one of crucial importance, in large part because it affects so many of a student's important relationships. These include the relationships between the student and his teachers, parents, and fellow students.[284] In addition, the counselor's role affects the development of important aspects of the student's educational program.[285] The discussion that follows addresses the counselor's role and interactions with the student's teachers and parents; and the various aspects of the counselor's services for the student, such as counseling services with respect to the student's individual education program, particularly extracurricular activities and transitional services.

Effective communication between the counselor and special education teachers can assist counselors in delivering adequate services to students with disabilities. Though each have different roles, they share responsibilities with regard to academic development and transitional services. A pilot study on the relationship between teachers of the learning disabled and counselors indicated that the teachers overwhelmingly (43 percent) felt that they were responsible for providing postsecondary training to learning disabled students, compared to only 24 percent of the counselors. When asked to identify the needs of learning disabled students that went unmet, only 18 percent of the counselors who participated in the study identified transitional services such as career development and job placement, while 82 percent identified academic and staff development needs.[286]

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[280] Carolyn Wilkie, *Selected Proceedings of the Annual Conference of the Pennsylvania Association of Developmental Educator* (Pennsylvania Association of Developmental Educators, March 1995), p. 41.

[281] Pub. L. No. 101–476, 104 Stat. 1143 (1990)(codified as amended at 20 U.S.C. §§ 1400–1485 (1994)) *amended by* IDEA Amendments of 1997, Pub. L. No. 105–17, provides for counseling for the parents of disabled students. *See* Pub. L. No. 105–17, §§ 682–683.

[282] Synnove J. Heggoy and Dale F. Grant, *Conversations with a Learning Disabilities Teacher and a School Counselor: Working as Partners* (March 1995), p. 4.

[283] *See generally* Benita West, "School Counselor Preparation Towards Working with Students with Disabilities," master's degree seminar paper (Ohio University, 1992) and Michael E. Skinner, "Counseling and Special Education: An Essential Relationship, *The School Counselor* (November 1985), pp. 131–35.

[284] West, "School Counselor Preparation," p. 1.

[285] Skinner, "Counseling and Special Education," p. 132 (citing J.H. Lombana, "Guidance of Handicapped Students, *Counselor Education and Supervision*, vol. 19 (1988), pp. 269–75) ("Like their non-handicapped peers, handicapped students have wide ranging needs, interests, and abilities. Thus counselors have the same essential responsibilities to provide guidance services that will enable these students to achieve maximum potential in their educational, vocational, and social development.").

An important part of the work done by counselors is assisting students and their families in the development of an appropriate transition plan. The counselor's role in providing adequate transitional services is critical if students identified as having mental retardation, learning disabilities, serious emotional disturbance, or behavioral disabilities are to pursue a postsecondary education degree or secure full-time employment upon high school graduation. The IDEA requires that transitional services be provided for each student with a disability from early childhood through secondary school. The role of the counselor in developing transition plans may vary from school to school, but the counselor's role in transition services is an extremely important one. During early childhood education transitional services are incorporated into the individual family services plan. As the student moves to secondary education the transition plan is addressed in the student's IEP.[287] The transition plan usually includes a description of the student's disability, courses the student needs to take, accommodative aids and services, postsecondary plans, and community organizations that may play a significant role in the postsecondary transition.[288]

Counselors can make significant contributions in developing and maintaining relationships with these organizations. Successful transition to postsecondary education requires that schools establish effective relationships with adult services and community organizations.[289] By identifying individual needs and fostering collaboration with adult and community service providers, counselors can assist students identified as having mental retardation, learning disabilities, serious emotional disturbance, or behavioral disabilities and their families with health care, employment training, skills development, financial planning, and other transitional services.

Counselors also often play a role in determining the setting in which transitional services will be delivered. Postsecondary education will require students with disabilities to function in new and challenging environments. It is therefore a valuable practice to match each student's environment during transition services with the environment in which the student will be functioning after high school graduation. For example, authorities note, "a student who is planning to attend college and is able to function independently in the community may receive all services in the school setting. A student who plans to be employed after graduation and who needs assistance functioning in the community, however, may receive services in three settings—school, community, and employment."[290]

In addition to addressing the needs of the student who has been identified as having mental retardation, a learning disability, serious emotional disturbance, or a behavioral disability, counselors also may work to accommodate the needs of the student's family, particularly the parents. The relationship between the counselor and the parents is often an important part of counseling services. The counselor's input may be relied on by parents in making important decisions such as determining what programs and services best meet the needs and abilities of the child. Counselors also may assist parents by providing information on requirements such as admission criteria for colleges and universities, vocational schools, and employment services.[291]

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[286] Heggoy and Grant, *Conversations*, pp. 7–8.

[287] Jeanne B. Repetto and Vivian I. Corre, "Expanding Views on Transition," *Exceptional Children*, vol. 62, no. 6, pp. 551–63.

[288] Vickie M. Barr et al., *Getting Ready for College: Advising High School Students with Learning Disabilities* (American Council on Education, 1995), p. 4.

[289] Repetto and Corre, "Expanding Views on Transition," p. 558.

[290] Ibid.

Counseling Services: OCR's Enforcement Efforts

Equal and nondiscriminatory counseling services are necessary in providing a free appropriate public education, and for maximizing the potential of students with mental retardation, learning disabilities, behavioral disabilities, or serious emotional disturbance. All students identified as having a disability are guaranteed counseling services as part of the section 504 regulations' nondiscrimination provisions.[292] OCR principally implements section 504 with respect to counseling services for students identified as having a disability through a regulatory provision stating:

> [a] recipient to which this subpart applies that provides personal, academic or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.[293]

The first part of this provision specifically prohibits discriminating against disabled students in the provision of counseling services. It also specifies various aspects of counseling such as personal and vocational in which a school must provide appropriate services to each student identified as having a disability. In specifying various programs, this provision encompasses program accessibility and the barriers that can act to reduce it. The provision also requires that counselors avoid steering disabled students to more restrictive career fields than regular education students. It states that students identified as having disabilities must be counseled on career opportunities suited to their individual interest and abilities.[294]

A review of OCR policy documents reveals that OCR has not drafted any recent policy guidance on counseling services under section 504. However, OCR has issued technical assistance material on counseling services. One such technical assistance document discusses the requirements of guidance counselors under the implementing regulations for Title VI, Title IX, and section 504.[295] This document emphasizes that equal and nondiscriminatory counseling services are necessary to provide a free appropriate public education to each student and to maximize the potential of students identified as having disabilities.

A review of OCR's case letters addressing the counseling services provision of the section 504 regulations reveals that OCR often has dealt with counseling services as a related aid or service under a student's IEP. It appears as though most violations involving counseling services were made in the context of not providing a FAPE pursuant to section 504, section 104.33. For example, in a case where the parents of a learning disabled student alleged that the school district denied their child a free appropriate public education by not providing personal counseling as a related service, OCR found that the school was in violation of the FAPE provision of the section 504 regulations.[296] OCR found that, in discontinuing counseling services for that student, the school district denied that student a free appropriate public education. In particular, OCR stated that the school had discontinued "counseling as a related service without a complete and documented assessment of the student's emotional condition."[297] OCR found the school district in violation of the counseling provision of the section 504 regulations.

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[291] *See generally* Judy O. Berry and Thomas George, "Effects of Seminar Participation on Parental Attitudes Concerning the Use of the School Counselor as a Resource," paper presented at the annual meeting of the Mid-South Educational Research Association, November 1994.

[292] 34 C.F.R. § 104.37(b) (1996).

[293] *Id.* § 100.37(b).

[294] *Id.*

[295] DOEd, OCR, "The Guidance Counselor's Role In Ensuring Equal Educational Opportunity."

[296] 34 C.F.R. § 104.33 (1996).

In another case addressing counseling requirements, OCR investigated the Aldine, Texas, school district. OCR found the school district in violation of section 504 for failing to provide "weekly counseling services as required by the student's IEP, thus violating C.F.R. 104.33(a) and (b)." However, since the IEP stated that "counseling services would only be needed on a month to month basis," OCR found that the school district met its counseling obligation under the section 504 regulations.[298] Another case shows that family counseling also is considered a related service.[299]

The OCR case letters reviewed consistently omit mentioning the counseling services provision at 104.37(b). This omission renders OCR's enforcement analysis with respect to counseling services less persuasive than it might otherwise have been.

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[297] John E. Palomino, Regional Civil Rights Director, OCR, Region IX, DOEd, letter to Stan Halperin, Superintendent, Farmersville Elementary School District, Farmersville, CA, re: Complaint No. 09–91–1057, June 14, 1991, *reprinted in* 18 IDELR 157.

[298] OCR, DOEd, letter to M.B. Donaldson, Superintendent, Aldine Independent School District, Houston, TX, re: Complaint No. 06–90–1097, July 12, 1990, 16 EHLR 1411.

[299] *See* Brenda L. Wolff, Acting Regional Civil Rights Director, OCR, Region II, DOEd, letter to Kenneth R. Crush, Acting Superintendent, Henrico County Public Schools, Richmond, VA, re: Complaint No. 03–94–1066, June 7, 1994.

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Chapter 10

Findings and Recommendations

Conclusion

Section 504 of the Rehabilitation Act of 1973, the Individuals with Disabilities Education Act (IDEA), and Title II of the Americans with Disabilities Act of 1990 (ADA) provide effective means for ensuring nondiscrimination and equal educational opportunity for students with disabilities. Through these laws, students with disabilities have protections against exclusion, denial, or discrimination on the basis of disability in public elementary and secondary education and a right to a free appropriate public education.[1] With enactment of the IDEA and section 504 in the 1970s, there has been a dramatic change in public education for students with disabilities. Students with disabilities have gained greater access to regular education schools and classes and more opportunities for interaction with students who do not have disabilities. In addition, education for students with disabilities has become more individualized and focused on the needs of the individual student rather than on a category of disability.[2]

In fulfilling responsibilities under section 504, the IDEA, and Title II of the ADA, the U.S. Department of Education (DOEd) has developed comprehensive programs. It has delegated responsibility to the Office of Special Education and Rehabilitative Services (OSERS) for the IDEA and the Office for Civil Rights (OCR) for section 504 and Title II of the ADA.[3] DOEd, through the work of OSERS, OCR, and other offices, has played a major role in defining the rights and responsibilities necessary to provide a free appropriate public education (FAPE) to students with disabilities.[4] In addition, OCR has expanded the rights to nondiscrimination under section 504 to include the concept of FAPE.[5]

OCR has developed an excellent section 504 program relating to public elementary and secondary education. In all aspects—implementation, compliance, and enforcement, the program is comprehensive and informed by educational standards and research. As the basis for OCR's section 504 program, the section 504 regulations are extremely detailed and well-developed. The provisions on elementary and secondary education serve as guidelines for ensuring that civil rights and equal opportunity considerations are implemented in education practices. Although these provisions are civil rights requirements, in that they implement section 504, they are founded on educational standards, and, therefore, represent an interrelationship between civil rights and educational principles.

Beyond the section 504 regulations, OCR has drawn on education research and standards in developing policies, crafting remedies, and creating technical assistance materials. OCR has used the assistance of educational experts and research organizations, and it has worked with program offices, such as OSERS and the Office of Educational Research and Improvement (OERI).

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[1] *See* chap. 2, pp. 36–40.

[2] *See* chap. 2, pp. 10–21.

[3] *See* chap. 4, pp. 82–85.

[4] *See* chap. 4 generally.

[5] *See* chap. 4, pp. 102–06.

In addition, it has worked with the Office of Special Education Programs (OSEP) within OSERS to coordinate activities relating to section 504 and the IDEA.[6]

OCR has developed a substantial amount of section 504 policy memoranda and letters, most in response to case-specific issues or developments in section 504 case law. Because of their level of detail, the section 504 regulations largely are the basis of OCR's compliance standards under section 504. From a review of OCR case letters and interviews with staff, it is evident that OCR looks to State educational guidelines and professional education standards to inform its section 504 analysis on various issues. OCR also has produced a number of technical assistance and education materials to inform its staff, school districts, students with disabilities, and their parents/guardians of section 504 requirements and "promising practices" to promote section 504 compliance.[7]

With disabilities such as learning disabilities, mental retardation, behavioral disabilities, and emotional disturbance, a number of complex issues raise implications for section 504, the IDEA, and Title II of the ADA. For example, schools have faced difficulties with trying to place students with disabilities in less restrictive settings as required by law, while also balancing the need to maintain class order and safety.[8] Reports of overrepresentation of minority students among those students classified as having learning disabilities, mental retardation, and behavioral or emotional disabilities have raised questions about special education referral and evaluation practices.[9] Overall, between 1977 and 1994, enrollment of students with disabilities in public schools increased substantially while pupil enrollment decreased during the same period. Reports of special education teacher shortages in severe disability specialties, such as emotional disturbance, raise concern about whether appropriately trained instructors are teaching students with these disabilities.[10]

Overall, section 504, the IDEA, and Title II of the ADA have provided extensive protections to students with disabilities. In addition, OCR has developed a comprehensive and progressive program to implement and enforce section 504. However, a closer look at these laws and Federal enforcement of section 504 reveals some areas where the laws and OCR's work could be improved. The U.S. Commission on Civil Rights presents the following findings and recommendations based on its study of the Federal enforcement of section 504 and its focus on public elementary and secondary education for students classified as having learning disabilities, mental retardation, behavioral disabilities, or emotional disturbance.

Chapter 3. National Statistical Trends for Students with Disabilities

Finding: Complete and accurate data on education resources, placement settings, measures of achievement, and indicators of attainment are used in decisionmaking by policymakers at the Federal, State, and local level, and by State and local education agencies, school principals, guidance counselors, directors of special education, and teachers. The quality, accuracy, and completeness of the data and other information can affect access to and participation in quality education by students with disabilities.

There are several areas in which DOEd could improve its presentation of data to ensure that the education community can use the data to its best advantage to promote equal educational opportunity for students with disabilities. In readily available annual reports, DOEd, in particular the National Center for Education Statistics (NCES) and the Office of Special Education Programs and Rehabilitative Services (OSERS), too often present data as isolated numbers in tables without adequate explanations of the meaning and limitations of the data presented. For instance, DOEd reports do not distinguish adequately between type and level of disability (such as mild vs. moderate vs. severe mental retardation); and they do not discuss the relative merits of measures and indicators of educational attainment (e.g., dropout rates, rates of high school completion by diploma or certificate of attendance). As a result, users of DOEd's reports may not be provided sufficient information to make informed decisions based on the data.[11]

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[6] *See* chap. 4, pp. 90–92.

[7] *See* chaps. 4–9 (discussions on OCR's Implementation, Compliance, and Enforcement of section 504).

[8] *See* chap. 6, pp. 177–79.

[9] *See* chap. 5, pp. 133–59.

[10] *See* chap. 8, pp. 274–75.

Recommendation: In general, NCES and OSERS should take greater care in their presentation of data in such annual reports as the *Digest of Education Statistics*, *Condition of Education*, and *To Assure the Free Appropriate Public Education of All Children with Disabilities* to ensure that the definitions, sources, meaning, and limitations of the data are explained in a manner that is understandable to the education community. These explanations should be placed in close proximity to the data presented, so that all users of the data can make more informed use of data to enhance educational opportunities for students with disabilities.

Finding: DOEd does not collect data on the demographic characteristics (e.g., race/ethnicity and gender) of students with disabilities on an annual basis. The only source that regularly collected such information was DOEd's Office for Civil Rights' Civil Rights Survey of Elementary and Secondary Schools. However, the Civil Rights Survey is no longer administered regularly, and it is not comparable to other data collected on students with disabilities, such as the data on students receiving Federal aid under IDEA, Part B State grants collected annually by OSERS from the States.

Although DOEd reports such as the *Condition of Education* and the *Digest of Education Statistics*, provide data on enrollment in federally funded special education programs, such as percentage of students by disability category in particular educational placement settings (e.g., regular class, resource room, and separate class); as well as indicators of attainment (e.g., dropout rates, rates of high school completion by diploma, rates of high school completion by certificate of attendance), these data are not displayed by students' demographic characteristics. Furthermore, data on students' demographic characteristics (e.g., race/ethnicity and gender) generally are not reported in conjunction with the number and percentage of students identified in various disability categories, assigned to particular education settings, and exited from special education by a particular basis. As a result, researchers cannot readily determine the percentages of students enrolled in special education programs by race, ethnicity, and gender. Similarly, the data do not permit comparison of dropout rates of white and black pupils identified as mentally retarded. Moreover, comparisons in measures of educational opportunities and attainment for disabled and nondisabled students within a particular gender or race/ethnicity category are limited. Consequently, State and local special education directors' ability to assess the extent to which potential discriminatory barriers exist in particular programs for students with disabilities is hindered.[12]

Recommendation: NCES and OSERS should ensure that data are collected and presented on the demographic characteristics (race/ethnicity and gender) of students with disabilities on an annual basis to enable researchers, policymakers, and other decisionmakers to consider disabled students' demographic characteristics in conjunction with their disability category, educational experiences, placement setting, and indicators of attainment. Consistently available information on the demographic characteristics of students who are identified with a specific disability, assigned to a particular education placement setting, and who have exited special education by a particular basis will enable data users, for instance, to: (a) compare over time the percentages of students by race and ethnicity who are identified with a particular disability, or assigned to a particular education setting (such as a separate classroom), or have graduated or dropped out of high school; and (b) track the percentage of males versus females with learning disabilities who have graduated from high school by earning a diploma. In cases where data on demographic characteristics cannot be reported, DOEd should provide a justification to the education community.

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[11] *See generally* chap. 3.

[12] *See generally* chap. 3.

Finding: OSEP funded a longitudinal study of a representative sample of students receiving special education services who were between the ages of 13 and 21 in 1987. The study, entitled the National Longitudinal Transition Study of Special Education Students (NLTS), was mandated by Congress to provide information on the transition of students with disabilities from secondary school to adulthood. The 5-year study followed a representative sample of more than 8,000 secondary school age youth with disabilities who represented 11 different Federal disability categories. Data were collected to address concerns of the education community such as (a) the types of programs in which students with disabilities participate; (b) contributions of academic, vocational, and other programs that affect students' in-school performance (such as teacher/student ratios, access to and utilization of computers); as well as (c) program characteristics that enable these students to progress into postsecondary education.

The NLTS examined participation in postsecondary education as a function of instruction time in less restrictive classroom environments; and participation in postsecondary education as a function of type/severity of disability. Results of the study provided reliable and useful information on outcomes of students with various disabilities who complete high school versus those who drop out of high school. In addition, the study collected data on students' demographic factors (such as race/ethnicity, gender, family income, and household characteristics such as family size). The NLTS permitted studies of the statistical relationship of a student's gender, ethnic background, socioeconomic status, and other characteristics to school performance (e.g., absenteeism and number of courses failed), dropout rates, and other education variables.[13]

Recommendation: NCES or OSERS should conduct a comprehensive study on an ongoing basis, such as the NLTS, that provides socioeconomic and demographic data and relates it to disabled students' school programs and educational outcomes.

Finding: In reports that are generally available to the public, such as the annual reports, *Digest of Education Statistics*, *Condition of Education*, and *To Assure the Free Appropriate Public Education of All Children with Disabilities*, DOEd (NCES and OSERS) presents data on students with disabilities in broad, summary format and does not provide sufficiently specific categories for the education community to make the best possible use of the data to promote equal educational opportunity for students with disabilities according to their specific needs. For instance, in DOEd's annual reports on the IDEA, *To Assure Free and Appropriate Education of All Children with Disabilities*, the global heading "mental retardation" is used to represent information on students who range from mildly to severely mentally retarded. Yet, students with various levels of mental retardation can have different characteristics and educational experiences. For instance, students who are mildly mentally retarded will be more likely to be placed in a regular classroom or resource room than their peers who require life support care, who may need to be educated in a separate facility to obtain the resources and services appropriate to their needs. Therefore, treating all students with mental retardation alike and reporting their experiences under one umbrella category of "mental retardation," may mask differences in the educational experiences of students with different levels of mental retardation.

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[13] *See* chap. 3, pp. 67–69.

However, many NCES and OSERS reports tend to combine data under the category "mental retardation" when presenting information on measures such as (a) numbers of students being served and (b) educational placement settings (such as regular classroom, resource room, separate facility). This practice prevents the researcher from examining and comparing the educational experiences (from enrollment in school, including the type of educational placement setting, through exiting special education) of students who have more severe forms of mental retardation to students who have more mild levels of the disability. Data reported separately for students with different levels of mental retardation could enable the education community to examine potential areas where barriers to equal educational opportunity could exist.

Recommendation: In collecting and reporting information on students with disabilities, NCES and OSERS should ensure that the data are broken down by both type and level of disability to the maximum extent practicable. In particular, data on students with mental retardation should be collected and reported separately according to whether students have mild, moderate, or severe mental retardation.

Finding: When presenting the number of students enrolled in special education programs as a percentage of total K–12 public school enrollment, DOEd does not clarify the exact source in which "total enrollment" data are located (e.g., the particular table in *Digest of Education Statistics* or *Condition of Education*). Researchers are thereby impeded from replicating the calculations required to determine the information that is presented in sources such as *Digest of Education Statistics 1996*, bottom tier, table 51, p. 65 and *Condition of Education 1995*, table 42–3, p. 346. Because of the lack of information on total pupil enrollment, researchers, policymakers, and others must rely on and accept the data that show the number of students within each of the major[14] specific disability categories, as a percentage of total enrollment.[15]

The information that is footnoted by NCES on total enrollment, "Based on the enrollment in public schools, kindergarten through 12th grade, including a relatively small number of prekindergarten students"[16] does not provide sufficient information for the reader to use special education enrollment data and determine the ratio of (a) students within each of the major categories of disabilities, who are served in federally supported programs to (b) entire K–12 public school enrollment.

Recommendation: NCES and OSERS should prevent possible confusion, misinterpretation, and multiple interpretations among education researchers, policymakers, directors of special education, and others interested in replicating the calculations that determine the percentage of the total (disabled and nondisabled) K–12 public school students who are identified as having a particular disability. DOEd should identify the specific source (document name, page number, and table number) of the total pupil enrollment data in the annual *Digest of Education Statistics* and/or other widely used publications, such as the *Condition of Education*. Users of DOEd data will thereby be able to calculate the exact percentage of students within a particular disability category relative to all disabled and nondisabled students enrolled in public school.

Finding: School-reported exit data on special education students have some limitations that can result in general underreporting of particular exit bases, such as dropout rates. Since 1992–1993, OSERS has added four specific categories to classify students exiting educational programs. These additional special education exit categories have replaced the "exited with status unknown" basis, and include, "returned to regular education," "died," "moved, known to be continuing," and "moved, not known to be continuing." The new format was optional in the 1992–1993 school year, but required in 1993–1994. The year 1993–1994 was the first year that all States reported data on students exiting special education using the revised OSERS data categories.

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[14] The *Digest of Education Statistics 1996* presents 12 distinct disability categories; and the *Condition of Education 1995* presents 11 categories.

[15] *See* chap. 3, table 3.2.

[16] *See* DOEd, *Digest of Education Statistics 1996*, bottom tier, table 51, p. 65; and DOEd, *Condition of Education 1995*, table 42–3, p. 346.

OSERS' requiring additional, more precise categories compels State education agencies to improve their accuracy in collecting data to track students, which can potentially (a) reduce the percentage of students who depart from special education programs prior to a State education agency's obtaining clarification of their status; and (b) help eliminate the erroneous assumption that students in the former "status unknown" exit category dropped out of school prior to completion.[17]

Recommendation: State and local education agencies, as well as DOEd, must continue to be aggressive in their efforts to track students as they participate in special education programs, and eventually prepare to exit those programs. Additional exit categories that could potentially be included are: institutionalized, incarcerated, and involuntarily and permanently suspended or expelled. Information on percentages of students with disabilities who have passed a general education development (GED) examination, rather than earned a standard diploma or attained a certificate of attendance, should be presented. In addition, DOEd and State and local education agencies should continue working together to implement more precise ways of reporting the bases for which students exit special education programs.

Chapter 4. The U.S. Department of Education's Enforcement of the Laws Affecting Students with Disabilities

OCR'S Rulemaking and Policy Implementation of Section 504

Finding: OCR has integrated education theories and principles into its section 504 civil rights program. It has drawn upon the knowledge and advice of education experts and education research organizations in developing policy, remedies, and technical assistance materials. In addition, it has relied on standards of professional education organizations in developing policy and compliance standards under section 504. The program offices within DOEd, particularly OSERS and OERI, are another source of educational research and information available to assist OCR on its section 504 responsibilities. OCR has used education experts from projects funded through OSERS and OERI to assist in cases and in the development of policy and technical assistance materials. This collaboration appears to have served as a useful resource to OCR's work. OSERS and OERI have offered a practical means for OCR to acquire greater knowledge of education issues and information on successful educational practices and the latest educational research. Therefore, it is surprising that OCR has not strived to develop an even stronger collaborative relationship with these offices.

OCR's interaction with OERI has been on an informal and ad hoc basis. It has not developed any formal or consistent practice of consulting OERI for educational information, although there are potential ways in which such collaboration could work. For example, one of the Senior Enforcement Directors for OCR indicated that OERI offered to provide training to the OCR regional offices on the educational perspectives relating to issues those offices address, although she was unsure if OCR had accepted the offer. In addition, she noted that it would be helpful to have OERI's library electronically accessible to OCR.[18]

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[17] *See* chap. 3, pp. 64–65.

Recommendation: OCR should develop a more consistent working relationship with OSERS and OERI, drawing from educational research and resources available through those offices to assist in the development of section 504 policy, standards, remedies, and technical assistance, training, and education materials. OCR should accept OERI's offer to provide training to the OCR regional offices. It also should collaborate with OERI to develop an ongoing training program. For example, OERI's educational experts, on an annual or semiannual basis, could train OCR headquarters and regional staff on specific educational practices and brief them on the latest educational issues or debates that may have section 504 implications. OCR also should work with OERI to gain electronic access to other resources, such as the National Education library. OSERS and OERI should keep OCR informed of the various programs, projects, or research efforts undertaken by or funded through the program offices that may provide useful information to OCR's section 504 program. As OSERS and OERI approve project grants or undertake research projects, OCR will have knowledge of possible sources that can assist in the development of section 504 policy, technical assistance documents, and education materials.

Finding: The section 504 regulations use the language "qualified handicapped persons" to describe covered persons. Despite the change in the statutory language of section 504 to use the term "individual with a disability" in place of "handicapped person," DOEd/OCR retains the reference to "handicapped persons" throughout the regulations.[19]

Recommendation: In the event DOEd/OCR undertakes a general review of section 504 regulations, DOEd should also modify the phrase "qualified handicapped persons" to conform to the current language of the statute.

Proving Discrimination Under Section 504: Free Appropriate Public Education

Finding: In enforcing section 504, the OCR seems to have adopted a broad approach for defining discrimination. The section 504 regulations contain the general language of section 504 prohibiting exclusion from participation in, denial of benefits of, or discrimination under a federally assisted program or activity, on the basis of a disability, and it lists specific prohibited discriminatory actions. The regulations, however, depart from the language of the statute by explicitly defining exclusion from participation and denial of benefits as forms of discrimination. Subpart D of the regulations require the provision of a free appropriate public education (FAPE). The term "appropriate education" is defined to include adherence to requirements for the evaluation and placement of persons with disabilities, and procedural safeguards. Therefore, the section 504 regulations explicitly incorporate each of these requirements within the meaning of FAPE.

OCR's *Handbook for the Implementation of Section 504 of the Rehabilitation Act of 1973* specifies that "a violation of a provision of Subparts B through F [of the section 504 regulations] will *always* be a violation of Section 84.4 [now section 104.4]." If OCR does consider violations of the FAPE requirement in the regulations as violations of the antidiscrimination provision of the section 504 statute, then the failure by a public school system to adhere to requirements on FAPE, including the evaluation and placement of individuals and procedural safeguards, constitutes discrimination under the section 504 regulation. It is unclear, however, whether OCR uses this approach, as there are no policy documents or other materials which clarify the analysis.[20]

Recommendation: OCR should develop policy on its analytical approach to finding discrimination under section 504. The policy should discuss the relationships between the general nondiscrimination provisions at section 104.4 of the regulations, the requirements to provide a free appropriate public education, and the specific procedural requirements on evaluation and placement of students with disabilities and on procedural safeguards. The policy should clarify whether and/or when violations of the provisions on evaluation, placement, and procedural safeguards would be considered discrimination under the section 504 regulations and under the section 504 statute.

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[18] *See* chap. 4, pp. 85–88.

[19] *See* chap. 4, p. 94.

[20] *See* chap. 4, pp. 103–04.

FAPE As a Cause of Action Under Section 504

Finding: There is continued disagreement, however, among the lower Federal courts in interpreting section 504 on whether FAPE claims state a valid cause of action. The disagreement centers, in part, on determining when the failure to properly identify, evaluate, or place an individual, to provide procedural safeguards, or to provide a free appropriate public education amounts to discrimination under section 504. Several lower courts have interpreted section 504 broadly and have recognized claims related to the provision of a free appropriate public education, absent proof of intentional discrimination. They have considered the failure to properly evaluate a student or to provide certain services as sufficient cause to state a claim of discrimination under section 504. For example, in *Sanders by Sanders v. Marquette Public Schools*, the court adopted the rationale that when a failure to assess properly and accommodate a person with a disability denies him or her the benefit of measures that would make the education appropriate, there is a valid cause of action under section 504. The court interpreted this circumstance as presenting the element of discrimination or exclusion "on account of" disability.

Other courts, however, have interpreted the nondiscrimination provision of section 504 to require more than a failure to provide FAPE through a failure to evaluate correctly or a faulty educational plan to establish a cause of action under section 504. They have required proof of intentional discrimination. For example, in *Monahan v. Nebraska*, the Court of Appeals for the Eighth Circuit stated that "in order to show a violation of the Rehabilitation Act, something more than a mere failure to provide the 'free appropriate public education' required by EAHCA must be shown. . . . The reference in the Rehabilitation Act to 'discrimination' must require, we think, something more than an incorrect evaluation, or a substantively faulty individualized education plan, in order for liability to exist."

Two cases decided by the U.S. Supreme Court have raised questions of the extent to which an individual could bring an action under section 504 for matters relating to the provision of a free appropriate public education. *Board of Education of the Hendrick Hudson Central School District v. Rowley* involved a claim brought under the IDEA. Although the Court was not addressing an action brought under section 504, the Court in that case noted disapproval of the lower court's reliance on the section 504 regulations to define an "appropriate education." The Court further signaled its disapproval of a coextensive substantive interpretation of the two statutes. In *Smith v. Robinson*, the central issue before the Court was whether attorney's fees could be obtained under the Rehabilitation Act for a claim asserted under section 504, when the Education for All Handicapped Children Act (EHA) (now the IDEA) also was available to provide relief for the claim. In its analysis, the Court drew a distinction between the substantive right to a free appropriate public education under the EHA and the protections against discrimination under section 504. The Court noted that "both statutes are built around fundamental notions of equal access to state programs and facilities" and that "the rights of a handicapped child to a public education, have been interpreted to be strikingly similar." In outlining the distinction, the Court wrote, "it does not follow that the affirmative requirements imposed by the two statutes are the same. The significant difference between the two, as applied to special education claims, is that the substantive and procedural rights assumed to be guaranteed by both statutes are specifically required only by the [IDEA]." The Court, however, chose to refrain from deciding "the extent of the guarantee of a free appropriate public education that Congress intended to impose under § 504." The Court found that where the EHA is available to enforce substantive rights and section 504 adds nothing to those substantive rights, a plaintiff could not "circumvent or enlarge on the remedies available under the EHA [now IDEA] by resort to § 504." Although neither the *Rowley* case nor the *Smith* case completely foreclosed the right to file an action under section 504 in elementary and secondary education cases, the Court's decision in *Smith* left an impression that no relief would be available under section 504 if relief was available under the EHA for matters relating to the provision of a free appropriate public education.

To clarify the effect of the EHA on rights, procedures, and remedies available under section 504 and other laws, Congress enacted the Handicapped Children's Protection Act of 1986 (HCPA). The act amended the EHA to recognize that the EHA should not be interpreted as restricting or limiting the rights, procedures, and remedies available under the Constitution, section 504, or other Federal statutes protecting the rights of children and youths with disabilities. The legislative history of the 1986 statute indicates that Congress intended these amendments to accomplish at least two objectives. First, Congress intended to clarify its intent "with respect to the educational rights of handicapped children guaranteed by the EHA." Second, Congress sought to ensure that the EHA did not limit the applicability of other laws, such as section 504, in protecting the educational rights of students with disabilities. After the passage of the EHA amendments, it appears that individuals may file an action in court under section 504 for claims that also could be raised under the IDEA (i.e., the failure to properly identify, evaluate, or place a student or the failure to provide a free appropriate public education).

At least one court decision, following passage of the HCPA, poses questions on the issue. Consequently, there remains some confusion on the type of FAPE claims that state a valid cause of action under section 504 and the legal standards courts apply to such claims. This confusion is particularly significant because OCR resolves complaints alleging a denial of FAPE by relying on the section 504 regulations despite the inconsistency with judicial rulings.[21]

Recommendation: DOEd/OCR should develop policy guidance to clarify whether denial of FAPE is a cause of action under section 504. This guidance should discuss the impact of the Handicapped Children's Protection Act of 1986 on filing section 504 FAPE claims and the case law standards arising after this act. The guidance should clarify whether and when a violation of provisions in the section 504 regulations on FAPE, placement, evaluations, procedural safeguards would constitute a basis for filing a section 504 claim in court. The policy guidance should discuss whether problems such as faulty evaluations or educational plans give rise to a section 504 cause of action in court and the legal standards, if any, that must be met. For example, the policy should clarify whether a person filing the section 504 claim must show proof of gross misjudgment or bad faith or other intent to discriminate against a student. The policy also should provide examples of situations which do and do not establish a cause of action under section 504 so that students with disabilities, their parents/guardians, and schools will have a better understanding of the legal standards of section 504 FAPE claims.

Chapter 5. Using Neutral and Nondiscriminatory Diagnostic and Screening Procedures

Misidentification, Overidentification, and Underidentification of Students with Disabilities

Finding: Despite Federal requirements for identifying and evaluating students with disabilities, the misclassification of students with mental retardation, learning disabilities, behavioral disabilities, and emotional disturbance continues in public schools because of problems in the implementation of screening and diagnostic procedures. Many studies identify a variety of issues associated with misidentification, such as overidentifying some students as having a disability, failing to identify and address the disabilities of some students, and, to a more limited extent, identifying incorrectly the type of disability. In each case, the problems of misidentification of students with disabilities can lead to the same consequence, namely that the student's educational program does not meet his or her educational needs. The misidentification of students' educational needs is largely the result of two factors: (1) problems in defining certain disabilities for the purpose of identifying educational needs and services; and (2) problems with screening and diagnostic procedures.[22] The misidentification of students with disabilities may present serious civil rights implications under section 504 as a potential violation of the nondiscrimination provisions and as a denial of a free appropriate public education.

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[21] *See* chap. 4., pp. 109–15.

Recommendation: To address the misidentification of students with disabilities and its civil rights implications, OCR should collaborate with OSERS, educators, administrators, psychologists, clinicians, social workers, and other experts to examine the problem. This collaboration may include conferences, consultations, clinical studies, and/or program evaluations designed to develop clear criteria for identifying students with disabilities. For example, in identifying students with disabilities, school districts should apply clear criteria for measuring subjective factors, such as behavior and emotions that may affect their classification.

Defining Disabilities

Finding: There is no clear standard for defining disabilities such as learning disabilities, mental retardation, behavioral disabilities, and emotional disturbances. The absence of clear standards is considered one of the factors that can contribute to misidentification of students with disabilities or a failure to appropriately serve the educational needs of students with disabilities. Multiple definitions for disabilities can be classified into three types based on purpose: (1) those providing clinical diagnoses, (2) those determining eligibility for certain services, and (3) those determining coverage under civil rights statutes such as section 504. There can be overlap in definitions used for different purposes. For example, school districts often rely on the professional/clinical definition of a disability in deciding who is eligible for special education and related services. Ambiguity and subjectivity, however, can result in differing interpretations of the same clinical definition across school districts. As a consequence, a student with a disability may lose eligibility for special education, related services, or accommodations upon transferring to another school system. Some concerns have been raised about definitions of disabilities in the IDEA, its implementing regulations, and other State laws and regulations that delineate who is entitled to IDEA protections or who is eligible for special education and related services. One concern is that with the IDEA definition, although a child may be considered by education professionals to have a disability requiring special education and related services, he or she may not be accorded IDEA protections solely because his or her disability does not "fit" under IDEA definitions. Congress has sought to address this problem in the IDEA Amendments of 1997 by expanding service eligibility under the act through a change in the definition of "developmental delay" to include children ages 3 through 9, thereby increasing the age at which a local educational agency identifies a student as having a particular kind of disability (within one of the statute's 13 disabilities categories). However, there remain major concerns in the education community relating to problems with defining disabilities. One such concern is that narrowly written State and local definitions may deny needed special education and related services to a student with disabilities without consideration for a student's actual need merely because the student's disability did not "fit" under State or local definitions.[23]

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[22] *See* chap. 5, pp. 122–23

[23] *See* chap. 5, pp. 123–31.

Recommendation: In viewing the concerns expressed about disability definitions to determine IDEA protections and eligibility for services, Congress, in future reauthorizations of the IDEA, should review the change it has made in expanding service eligibility for students identified as having a "developmental delay" from ages 3 to 5 to ages 3 to 9 to determine whether this change has been sufficient to address concerns with defining disabilities. In addition, Congress should review its general approach to defining disabilities with disability categories. If testimony before and studies presented to Congress reveal that a different approach would be better in ensuring students with disabilities equal educational opportunity, Congress should reform the IDEA accordingly. State and local governments also should review their existing disability definitions for determining special education and related services eligibility. They should consider whether their definitions are denying needed special education and services to students with disabilities in their jurisdictions. State and local governments should collaborate and consult with experts in a variety of fields to develop a method for defining disabilities and for applying those definitions in individual school districts. Moreover, State and local governments from all States should work together to determine the best education practices for defining disabilities and determining service eligibility, and they should consider whether a uniform standard may best serve the needs of students.

Defining Behavioral Disabilities and Emotional Disturbance

Finding: The different definitions for behavioral disabilities are each based on behaviors that violate cultural norms governing appropriate and acceptable behaviors. Each definition includes criteria that judge behavior based on significant deviations from behavior appropriate to a child's age. However, the definitions do not indicate the basis or norm for deciding what is appropriate and acceptable behavior. Some studies suggest that it is the specific culture of the student, rather than any categorical traits associated with a behavioral disability, that defines the student's attitudes towards education. These studies also suggest that sensitivity to the culture of a student can assist in identifying treatment and services crucial to effective special education for behaviorally disordered students. The reliance on cultural norms in the definition of behavioral disabilities can cause evaluators to confuse a student's cultural and familial traits with traits associated with a behavioral disability. This confusion can cause evaluators to overidentify students as having a behavioral disability, a problem that can have serious civil rights implications.[24]

Although the statutory language of the IDEA Amendments of 1997 dropped the modifier "serious" from the term, the law still has not explicitly established clear criteria for defining the behavior that may indicate emotional disturbance. In addition, many States continue to use the term "serious emotional disturbance" in their State laws and policies. The use of the term "serious emotional disturbance" is problematic because it is difficult to distinguish a "serious" emotional disorder from other emotional disorders. The distinction made between "serious" and other kinds of emotional disturbance requires a highly subjective judgment that may result in a failure to provide services to emotionally disturbed students who require special education. The problem in accurately defining emotional disorders is compounded by the fact that emotional disabilities, unlike physical disabilities, often are not apparent. As a result, there is no generally recognized set of descriptive statements to characterize emotionally disturbed children. Because there is no quantifiable element to define emotional disturbance, such as low achievement, identification is based primarily on subjective methods such as teacher judgments and teacher referrals. These subjective methods are often influenced by the sex or age of the child, the sex of the teacher, and the fact that the teacher has been told that the child is emotionally disturbed. As with the problems with defining behavioral disorders, teachers and evaluators may not identify students appropriately as having emotional disorders because of stereotypes or an absence of knowledge and/or understanding about the child's cultural or social background. Consequently, students may be misidentified as having emotional disturbance. Because of concerns with defining behavioral disabilities and emotional disturbance, a proposed definition for "emotional or behavioral disorder" has been offered that takes into consideration factors such as a student's cultural background.[25]

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[24] *See* chap. 5, pp. 126–27.

Recommendation: The education community, in collaboration with DOEd, researchers, doctors, psychologists, social workers, other experts, parents, and students should establish clear criteria for defining the behavior and emotions that may indicate a behavioral disability or emotional disturbance. Clear criteria are essential if evaluators continue to judge the appropriateness of a student's behavior or emotions in determining educational placement. In establishing clear criteria, the collaborators must consider several factors beyond the mental/physical impairment, such as home life and culture, that can affect the student's behavior or emotions. In addition, Congress should amend the current IDEA definition for emotional disturbance to include references to cultural considerations. Congress and DOEd also should evaluate proposed changes to defining behavioral disabilities and emotional disturbance that would include references to cultural or ethnic norms defined by local community standards.

Defining Mental Retardation

Finding: Mental retardation is defined in the current regulations implementing Part B of the IDEA, but is not defined in the regulations implementing section 504. The IDEA regulations define "mental retardation" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance." These regulations, however, do not define some of the key phrases in the definition, such as "general intellectual functioning," "significantly subaverage," "developmental period," or "adaptive behavior." Consequently, the responsibility for defining mental retardation in more specific terms rests with individual States. Many States have relied on the 1973 American Association of Mental Retardation's (AAMR) definition, presented in the 1977 *Manual on Terminology and Classification in Mental Retardation* which does define the phrases found in the IDEA definition. In 1992, the AAMR revised its definition in response to concerns about the problem of overidentification. The new definition takes into consideration a student's cultural and linguistic diversity and differences in communication and behavioral factors. It relies on a multidimensional approach to describe the individual.[26]

Recommendation: DOEd should consider revising the current definition for mental retardation to address the problem of overidentification. It should consider modifying the definition to conform to the current AAMR definition. If the current IDEA definition is retained, DOEd should adopt a standard explanation of the phrases associated with the IDEA definition of mental retardation. DOEd should ensure that a standard definition applies to both the IDEA and section 504 and that it is updated as necessary to remain current with advances in the medical and psychological descriptions of mental retardation. The standard definition also should be included in the appendix to the section 504 regulations.

The Definitions of Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder

Finding: Observational methods in the evaluation process, such as completion of checklists and rating scales, can be extremely subjective, leading to concerns that they may contribute to misidentification of students. One process for identifying children and youth with attention deficit disorder/attention deficit hyperactivity disorder (ADD/ADHD) is based on a checklist of symptoms listed in the American Psychiatric Association's 1994 Diagnostic and Statistical Manuals of Mental Disorders, DSM–IV. DSM–IV establishes the age for onset of ADD/ADHD at 7 years of age. The DSM–IV requires evidence of the persistence of symptoms for at least 6 months for a diagnosis of ADD/ADHD. The severity of the disorder is based on the number of symptoms that exceed the threshold of eight symptoms. This process, however, has the potential to improperly identify students because the same number of threshold symptoms and behavioral description of symptoms apply uniformly to students of all age levels and both sexes. The checklist method is likely to overidentify younger children because such children often exhibit ADD/ADHD symptoms due to their young age and maturity level, not due to a disorder. The process also is likely to underidentify female students who typically present few symptoms but may be as educationally impaired as male students. Because of these problems, the DSM–IV manual emphasizes that teachers and parents are the best source of data. Since parents and teachers are most familiar with a student's behavior, they can most accurately describe the degree to which a student displays certain symptoms. Rating scales supplement the DSM symptoms checklist method by quantifying the degree of each behavioral symptom. Parents and teachers rate a student's behavioral symptom using a four-point scale exhibiting a range from "not at all" to "very much." However, as in the problem with teacher referrals, there can be much subjectivity in the process and, thus, a potential for problems with bias.[27]

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[25] *See* chap. 5, pp. 123–31.

[26] *See* chap. 2, pp. 21–22; chap. 5, p. 130.

Recommendation: DOEd should collaborate with educators, psychologists, clinicians, and other experts to examine the problem of defining ADD and ADHD. Because of the potential civil rights implications of over- and underidentifying students with ADD and ADHD, DOEd should work with these parties to develop less subjective means of defining ADD and ADHD to promote accuracy in diagnosis. Based on this collaboration, DOEd should develop clear guidance on the definitions of ADD and ADHD to assist persons with ADD and ADHD, their parents, and schools.

Defining Disabilities and Assessing Eligibility Criteria: OCR's Implementation, Compliance, and Enforcement Efforts Under Section 504

Finding: One approach that OCR takes to definitions of disabilities is to consider whether State and local school district definitions and criteria for determining special education eligibility violate section 504 and other civil rights laws. OCR uses the general section 504 definition for "handicapped person" and the IDEA definitions in its analysis. It also uses professional standards as a guide in determining if eligibility criteria are discriminatory or if they deny placement to qualified students. OCR's reliance on professional standards helps to ensure that schools use criteria recognized as educationally sound by a professional education organization. It also promotes greater uniformity of eligibility criteria throughout various school districts across the country. The consistency of eligibility criteria, in turn, helps to ensure that a student who is receiving necessary special education services in one school district will not be deprived of those services in another school district because of differing eligibility criteria.[28]

Recommendation: OCR should continue to rely on professional standards as a guide in its analysis. OCR also should work in partnership with professional education organizations to develop clear standards for defining disabilities. Once clear standards are established, OCR should engage in joint efforts with professional education organizations to educate school districts on those definitions and how they apply. Such efforts will help to ensure a consistency in all jurisdictions in determining who is eligible for special education and other related services.

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[27] *See* chap. 5, pp. 144–45.

[28] *See* chap. 5, p. 133.

Finding: Although OCR may not find a school's criteria for defining a disability to be discriminatory, it will consider other factors to ensure that a school provides appropriate services to a student. This approach demonstrates responsiveness to some of the concerns raised about disability definitions. For example, although OCR has not necessarily sought changes to a school's definitions, it has recommended a more limited use of the definition as a guide rather than as a rule. In addition, it has encouraged schools to consider other assessments in evaluation decisions beyond a child's "fit" within the particular disability definition. This approach is in keeping with a "needs-based" focus in providing equal educational opportunity. It permits students who do not necessarily exhibit all of the characteristics defining a disability, such as a "severe discrepancy between achievement and performance," to still be considered for special education, related services, or accommodations. Conceptually, it acknowledges that the primary emphasis should be on identifying a student's actual needs in light of the effects of a disability, instead of a "match" between characteristics or behavior exhibited by a student to specific definitional criteria.[29]

Recommendation: OCR should continue this approach when investigating a school district's use of disability definitions in determining eligibility for special education, related services, or accommodations. OCR should continue to encourage school districts to use disability definitions as guides, not rules, until research and studies produce workable criteria for all school districts to use. OCR should continue to urge school districts to place less emphasis on a student's "fit" into a specific disability definition and more focus on the needs of the student, whatever his or her disability.

OCR's General Approach to Screening, Referral, and Diagnostic Practices

Finding: Problems associated with various screening, referral, and diagnostic practices can lead to misidentification of students. The problems can include inadequate training to identify disability symptoms and evaluate students, and inaccurate or unreliable evaluation methods and tools. OCR has been active in addressing the issue of misidentification through outreach, education, and technical assistance and more vigorous enforcement of present civil rights laws and policies applicable to students with disabilities. OCR has produced two comprehensive policy memoranda. These materials provide detailed guidance on legal approaches to screening, referral, and evaluation of students for special education, related services, or accommodations. In addition, OCR has conducted compliance reviews targeting the issue of overrepresentation of minority students in special education. It has developed a thorough approach to reviews, looking at overrepresentation of minority students in special education generally and within certain disability classifications. In terms of resolutions and remedies, one of OCR's strategies is to assist the misidentified student in reaching his or her appropriate grade and achievement levels. In negotiating for resolutions or remedies, OCR strives to obtain the additional "boost of resources and staff" necessary to compensate the student for the lost educational opportunities due to the mislabeling or misplacement. Because OCR recognizes the difficulty in obtaining a complete remedy for the student, it focuses many of the remedies or resolutions on preventing further problems with overidentification or misidentification.[30]

Recommendation: Congress and DOEd should provide appropriate funding for OCR initiatives to address the problem of misidentification. It should continue and expand efforts to create technical assistance materials. It should include in these materials suggestions for strategies to compensate mislabeled or misplaced students for lost educational opportunities and prevent further problems with overidentification and misidentification. Such information will assist OCR staff, students with disabilities, their parents/guardians, and school districts in devising practical resolutions and remedies.

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[29] *See* chap. 5, p. 134.

[30] *See* chap. 5, pp. 146–50.

Evaluation Process—Test Validity

Finding: OCR has produced an extensive draft policy manual on fairness in testing and assessment practices. The policy reflects OCR's recognition of the interrelationship between the legal and professional standards in educational testing. Portions of the policy, such as the guidance for determining test validity, are consistent with professional standards on testing. The policy manual, however, focuses on identifying discriminatory testing and assessment practices under Title VI and Title IX analyses. It does not clarify whether the legal approaches and analyses on issues such as test validity apply under section 504. A 1985 OCR policy memorandum, which predates the draft policy manual on testing, presents an analysis of test validity under section 504. The policy memorandum, however, is not the definitive statement on OCR's testing policy. The investigative guidance in the draft policy manual on testing is more definitive, and portions of the analysis outlined in the 1985 memorandum appear as part of the standards on testing outlined in the draft policy manual. It remains unclear whether OCR applies the test validity analysis in the Title VI/Title IX draft testing policy manual to section 504 testing issues.[31]

Recommendation: In issuing the formal Title VI/Title IX policy manual on testing, OCR should clarify whether this policy manual also presents the standards on testing issues, such as test validity, under section 504. If the policy manual does not apply to section 504, OCR should clearly establish standards for fairness in testing and assessment practices under section 504, and it should develop a separate section 504 policy manual on testing.

Finding: OCR has provided specific guidance on assessing test validity under section 504 in a 1985 policy memorandum. The memorandum provides detailed guidelines for determining whether testing and evaluation materials are valid. One question which is not addressed is whether the section 504 requirement that tests be validated for the special purpose for which they are used, requires validation of tests for students of a particular race or national origin group. OCR notes that this is an open question and one which it hopes to have answered through assistance from the National Academy of Sciences, Board on Testing and Assessment.[32]

Recommendation: OCR should continue to work with the National Academy of Sciences, Board on Testing and Assessment to determine whether tests are adequately validated. It should include its findings in a section 504 policy manual that clearly defines the standards on testing and assessment practices under section 504.

Chapter 6. Structuring Educational Programs

The Least Restrictive Environment Requirement: OCR's Implementation, Compliance, and Enforcement Efforts Under Section 504

Finding: OCR has not issued any formal policy or investigative guidance on the analytical framework it employs in determining compliance with the least restrictive environment (LRE) requirement. OCR's analytical approach on the LRE requirement is based on the presumption that students with disabilities belong in the regular education environment. A school district cannot remove students with disabilities from the regular setting unless the removal is educationally justified. OCR considers whether the educational professionals have provided some justification for the removal and whether there is evidence to support the justification. It does not question or second guess this justification as long as it is educationally sound. OCR, however, has not detailed the precise standards for an educational justification. Staff members in one regional office described their approach to LRE cases and mentioned their use of input from educational experts and IDEA case law. This approach is not documented in OCR policy or other documents; therefore, it is unclear whether other regional offices apply the same approach.[33]

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[31] *See* chap. 5, pp. 146–47, 155–57.

[32] *See* chap. 5, p. 157.

Recommendation: OCR should develop formal investigative guidance that presents compliance standards for the least restrictive environment requirement. This guidance should discuss criteria for determining whether a school's reasons for removing a student to a more restrictive placement are educationally sound. These criteria should be informed by prevailing thought in the educational profession of what are sound educational methodologies. The guidance also should include mention of relevant section 504 and IDEA case law.

Finding: The discipline of students who have disabilities often can be a complicated issue. Care must be taken to understand the cause of a student's disruptiveness or behavior, so as to avoid inappropriate removal of the student from his or her current placement setting. OCR has assisted in bringing clarity to the issue of discipline under section 504. It has produced policy to clarify the section 504 regulation requirements when disciplining students with disabilities. The policy is helpful by providing specific guidelines on and explanations of section 504 rights and responsibilities. A 1988 policy memorandum offers guidelines on the duration of suspensions or expulsions. It is very clear and practical in informing schools of when certain section 504 obligations do or do not arise. Other policy memoranda, however, are less clear. A 1989 policy memorandum states that conduct would be a manifestation of the disability "if the handicap significantly impairs the child's behavioral controls," but not if it "bears only an attenuated relationship to the child's handicap." Standards such as "significantly impairs" and "attenuated relationship" are vague and lack context to actual educational practices. For example, they provide no reference to or examples of the professional educational and clinical standards used in schools.[34]

Recommendation: OCR should review its standards for defining when the conduct of a student with a disability is and is not a manifestation of the disability. To create clearer and more practical standards, it should consult the professional standards of education organizations and research institutes. Because there can be benefits to general standards, in that they are not overly preclusive, it may not be necessary to eliminate the section 504 standards that currently exist. However, to provide greater meaning and clarity, OCR should include, in policy and technical assistance materials, examples of professional standards and/or citations to major research on the issue. Such information would provide more concrete meaning to the definitions for what does and does not constitute conduct that is a manifestation of a disability.

Finding: OCR has not taken a position on the debate over special education—whether inclusion, full inclusion, REI, or the status quo is the best educational practice. Because OCR's emphasis is on section 504, it does not characterize section 504 requirements or compliance in terms for or against REI, "inclusion," or "full inclusion." Nonetheless, these issues remain heavily debated, and they are "terms of art" used widely when educating students with disabilities. In providing outreach and education, OCR has not provided information on contemporary issues, such as the implications of REI, "inclusion," and "full inclusion" on section 504. It also has not created a publication specifically devoted to the LRE requirement. However, it has produced at least two pamphlets on section 504 addressing placement issues. One, a 1991 section 504 pamphlet on student placement in elementary and secondary schools, is helpful in providing a basic overview of placement requirements. The pamphlet, however, fails to mention that, when placing a student with a disability in a setting other than the regular educational environment, the section 504 regulations require that proximity of the alternate setting to the student's home should be taken into account.[35]

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[33] *See* chap. 6, pp. 187–89.

[34] *See* chap. 6, pp. 192–94.

Recommendation: OCR should develop outreach and educational materials that specifically discuss the least restrictive environment (LRE) requirement. In addition to discussing the basic LRE requirements, these materials should provide information on section 504 in relation to contemporary topics, such as "inclusion," "full inclusion," and REI. OCR should ensure that section 504 materials which discuss placement and/or LRE include a discussion of the requirement to consider proximity of an alternate setting to the student's home.

Finding: In recent years, OCR has begun developing "Promising Practices" documents, which describe educationally valid models that have been implemented in school districts across the country and promote equal educational opportunity in specific issue areas. None of these documents has addressed the issue of LRE and more specific contemporary issues, such as the placement of students with disabilities who have behavioral problems in the regular educational environment.[36]

Recommendation: OCR should develop a promising practices document that discusses the least restrictive environment requirement. It should include contemporary issues such as the placement of students with disabilities, who are disruptive or aggressive or who have behavioral problems, in the regular class/school. It also should address other topics that may facilitate placement of students with disabilities in the least restrictive environment, such as training for teachers, school principals, and other school staff. The document should include references to educational literature and/or studies that offer useful suggestions for ensuring adherence to the LRE requirement. Given the difficult decisions faced by schools in ensuring compliance with the LRE requirement while also promoting school/classroom safety, order, and effective learning for all students, a promising practices document that addresses LRE and the contemporary issues associated with it would be useful.

Reflecting Differential Needs and Abilities

Finding: Through the IDEA and section 504, Congress sought to ensure for students with disabilities an education that would meet their different needs and abilities in various subject areas. It sought to provide for children with disabilities a right to all the services and curricular options normally available to children without disabilities. It viewed the IDEA as the means to ensure that such services and curricular options were specially designed to meet the educational needs of children with disabilities, and it considered section 504 as the vehicle to assure that services and curricular options provided to all children were made available for children with disabilities. The language of the IDEA and the implementing regulations for IDEA and section 504 do not contain an express requirement to develop education programs for students with disabilities that meet their different needs and abilities in various subjects. Taking into account congressional intent and the express requirements that do exist, the IDEA and section 504 support this concept.[37]

Recommendation: DOEd and OCR should clarify the language of the IDEA and section 504 regulations so that it is clear that the regulations require education programs for students with disabilities that meet the students' different needs and abilities in various subjects. Such a clarification will help to reduce assumptions, and the negative consequences that arise from them, that a student requiring special education in one subject area will need special education for all subject areas. In addition, the clarification will assist in promoting access to regular education placements and instruction for students with disabilities to the greatest extent possible in meeting their educational needs and abilities.

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[35] *See* chap. 6, pp. 191–95.

[36] *See* chap. 6, pp. 195–96.

[37] *See* chap. 6, pp. 196–98.

The Education Afforded to Students with Disabilities as it Reflects Students' Differential Needs and Abilities: OCR's Implementation, Compliance, and Enforcement Efforts Under Section 504

Finding: Neither the IDEA, nor section 504, nor their implementing regulations, address the issue of educating students with disabilities who also have nondisability-related exceptional needs. Provisions of the IDEA and section 504 apply due to the fact that a person has a disability; therefore, a student is not entitled to a free appropriate public education under the IDEA or section 504 solely because of his or her nondisability-related needs. Thus, it is clear that the requirements for a free appropriate public education do not apply solely because a student is gifted or limited English proficient or because the student has other educational needs unrelated to a disability.[38]

Neither the section 504 regulations nor OCR policy requires written documentation of a student's specific needs, the necessary program for that student, or the actual services provided; nor do they encourage such information to be available in written form. Therefore, for OCR to make a finding of compliance with section 504, there must be evidence, through the statements of the student, the parents, teachers, evaluators, and other staff, school records, and other means, that the school identified the specific needs and services for the student and that it actually provided the identified services. From the standpoint of providing outreach, education, and technical assistance and more vigorous enforcement of present civil rights and policies applicable to students with disabilities, school districts would benefit from documenting this information in school records or in the IEPs, to ensure compliance with section 504 and to better assure that they are providing each student with a disability an education that meets his or her individual educational needs. In fact, at least one school district and two States use or encourage the use of written section 504 plans. Requiring written documentation of this information also would assist OCR in conducting section 504 investigations and compliance reviews. However, for school districts to take this action they would need a clear understanding of OCR's section 504 standards and the type and specificity of information required for compliance with section 504.[39]

Recommendation: OCR should modify the regulations to require written documentation of the identified needs of a student, the services identified as necessary for the students, and how those services are to be provided. In policy and through its outreach and education activities, OCR should encourage school districts to document this information. Although the recent trend has been to avoid more regulation and prescriptive requirements, this change would create little added burden on school districts, as they already are accustomed to documenting such information in IEPs for IDEA Part B compliance. This change also would assist school districts by bringing more consistency between IDEA Part B and section 504 requirements.

To further assist schools, OCR also should undertake to educate school districts on the type of information it looks for when determining if the education afforded to the student meets his or her individual needs. OCR, for example, could prepare and disseminate a pamphlet or handbook that presents this information. Because of the similarity between IDEA Part B and section 504 requirements, OCR should consider working jointly with OSERS to develop a pamphlet or guide. The guide should compare and contrast section 504 and IDEA Part B requirements. It also should provide examples of the type and specificity of information needed to (1) create an IEP in compliance with the IDEA Part B, and/or (2) sufficiently document the individualized education provided to a student based on section 504 requirements.

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[38] *See* chap. 6, pp. 211–14.

[39] *See* chap. 6, pp. 204–06.

Recognizing the Nondisability-Related Needs of Students with Disabilities: OCR's Implementation, Compliance, and Enforcement Efforts

Finding: The section 504 regulation does not specifically address the issue of educating students with disabilities who also have nondisability-related needs. In addition, OCR has not produced policy specifically addressing this topic. However, the regulation provisions can be interpreted to require that schools, in providing a free appropriate public education (FAPE) to students with disabilities, address the disability-related and nondisability-related needs of the student. When a school develops an education program or IEP for a student it is unclear whether the program or IEP should include elements to address nondisability-related needs, such as regular education needs, giftedness, and limited proficiency in English. A review of OCR case letters that have addressed this issue reveals that OCR appears to have adopted this interpretation for students who have disabilities and who also are limited English proficient. For students who have disabilities and who also are gifted, OCR has approached the cases as an "access" issue. OCR has not required that school districts, in providing a free appropriate public education, address the students' gifted needs, and it has not treated the denial of a student to gifted programs or services as a violation of the FAPE provisions of the regulation. Moreover, students are often placed in programs designed to address only their disabilities, rather than their giftedness. OCR has focused on the criteria for admission to gifted programs and determined whether they are discriminatory under the general nondiscrimination provision at section 104.4. Although OCR's approaches to these issues appear evident by its practice, the lack of clarity in the regulation and policy makes its approach less clear to school districts seeking to comply with section 504 and the students and parents affected by these issues. As a result, many parents and students may be deprived of an opportunity to learn and know their rights under section 504 and its regulation.[40]

Recommendation: OCR should clarify the effect of section 504 requirements on the non-disability-related needs of students who have disabilities. This clarification should address the obligation to provide a free appropriate public education under section 504 as it applies to students who have disabilities and who also have limited proficiency in English or who also are gifted. The clarification should discuss whether schools, when developing an education program or IEP for the student, must include components to address the student's regular education needs, language needs, and/or giftedness. OCR also should clarify the definition of "gifted/learning disabled" for purposes of section 504 enforcement. Once OCR has clarified section 504 obligations on this issue, it should conduct outreach and education activities to ensure that schools, parents, and students are aware of their responsibilities and rights.

Students with Disabilities Who Have Limited Proficiency in English: OCR's Implementation, Compliance, and Enforcement Efforts

Finding: State and local special education officials are requesting Federal assistance in their efforts to educate students with disabilities who also are limited English proficient. During a DOEd sponsored forum on special education held in early 1997, the special education director for the State educational agency of New Mexico implored DOEd to provide specific guidelines to State and local educational agencies on identifying, assessing, and teaching students with disabilities who also were limited English proficient. Diego Gallegos protested to DOEd about the lack of effective methods for evaluating limited English proficient students in general and requested discretionary funding to conduct assessment research. Another forum attendee, Anthony White, the supervisor of special education programs for the Newark, New Jersey school district, stated that he was not aware of any information demonstrating effective methods for identification or teaching of students with disabilities who also are limited English proficient. White stated that "[p]eople come and say, 'You're not doing it right, but they don't share a model for doing it.'"[41]

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[40] *See* chap. 6, pp. 214–15.

Part of the problem may lie in DOEd's dissemination of regulations and policy guidance addressing the nondisability-related educational needs of students with disabilities to States and local school districts. OCR has recognized that there are many civil rights considerations involved in educating students who have both a disability and limited proficiency in English, and it has approached this topic as raising both section 504 and Title VI issues. It has produced some policy and other resources on the placement of limited-English-proficient students in special education classes. These materials, however, have focused on the topic primarily in the context of Title VI requirements and policy. In OCR's 1991 "Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency," it recognized that policy guidance would be helpful on the relationship between section 504 and Title VI when placing limited-English-proficient students in special education programs. Although this policy memorandum also specified that OCR would prepare a separate policy update on this issue, OCR has not yet produced such a policy update. In recent years, however, OCR has made available to its staff certain technical assistance materials that directly address the issue of limited-English-proficient students who have disabilities.[42]

Recommendation: OCR should develop a policy update on the relationship of section 504 and Title VI when placing limited-English-proficient students in special education programs. Among the topics discussed in this policy, it should include clarification on whether schools, in developing education programs or IEPs, should include language assistance instruction as part of the responsibilities when providing a free appropriate public education to students with disabilities. The policy update also should address special education assessment of students who have limited proficiency in English. In addition, OCR should undertake thorough efforts to ensure all guidelines are disseminated properly to States and local school districts. Finally, OCR should work in cooperation with the Office of Bilingual Education and Minority Language Affairs, and the Office of Educational Research and Improvement to ensure that concerns such as those expressed by various educators at DOEd's 1997 forum on special education can be addressed in the most effective way possible.

Students with Disabilities Who are Gifted: OCR's Implementation, Compliance, and Enforcement Efforts

Finding: Some education researchers have tried to raise greater awareness of the issues associated with educating students with disabilities who also are gifted. Their main concerns have been that (1) a school may fail to identify a student for needed special education, related services, or other accommodations because of the student's giftedness, or (2) a school may fail to recognize the student's giftedness because of an exclusive or near exclusive focus on the student's disability. In both cases, the end result is the failure of a student's educational program to meet his or her unique and differing needs. This topic is one on which OCR has produced no policy updates, guidance, or technical assistance and education materials, despite a lack of clarity in the section 504 requirements on the subject of students who are both gifted and disabled. For example, it is unclear whether the FAPE requirements extend to a student's giftedness and whether schools must consider *all* of the educational needs of the student, including his or her giftedness, when providing an individualized education and developing an IEP.[43]

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[41] *See* chap. 6, pp. 211–12.

[42] *See* chap. 6, pp. 214–16.

Recommendation: OCR should develop policy guidance, technical assistance, and educational materials relating to students who have disabilities and who also are gifted. These materials should clarify whether the section 504 requirement to provide a free appropriate public education encompasses a student's giftedness. In addition, they should discuss whether schools, in developing an education program for the student, should incorporate elements to address the student's gifted needs.

Educational Perspectives and Policy on Reevaluation

Finding: The reevaluation process is intended as an important tool for ensuring that the individual needs of each student are being met and that program modifications are made when they are indicated. The concern among special educators is that sometimes school staff instead view the reevaluation process as no more than a procedural requirement that must be met instead of the substantive review process that it was intended to be.[44]

Recommendation: DOEd and OCR should conduct outreach and education activities on the reevaluation requirements under the IDEA Part B and section 504. In providing information on reevaluations, they should emphasize the substantive purposes behind the reevaluation process. DOEd and OCR should work with school districts to identify effective ways for implementing reevaluations so that the reevaluation process will be used for its intended purpose of ensuring that a student's educational needs are met. To the extent that DOEd and OCR find more effective ways of implementing reevaluations, OCR should incorporate this information into its technical assistance and "promising practices" materials.

Chapter 7. Notifying and Involving Parents in Their Children's Education

Federal Laws, Policies, and Programs Initiatives

Finding: The IDEA Part B, its implementing regulations, and the section 504 regulations contain several provisions requiring parental notification, consent, and participation at various stages in the special education process. They place affirmative duties on State educational agencies and school districts to maintain due process procedures for students with disabilities and their parents. The IDEA Amendments of 1997 have changed the statute to ensure parental participation in student evaluation and placement during the decisionmaking process. With the IDEA Amendments of 1997, in addition to the right to challenge a school's decisions relating to the identification, evaluation, or placement of a student with a disability, parents also have the right to participate in the school's initial decisionmaking process.[45] Under IDEA Part B and its regulations parents are assured the right to be present at an IEP meeting that is intended for the purpose of developing, reviewing, and revising a child's IEP. In addition, school districts must obtain parental consent before conducting a preplacement evaluation of a student or initially placing a student with a disability in a program providing special education and related services. In addition, these provisions require parental input on evaluations. However, although the IDEA Amendments of 1997 make clear that parents are to work with a team of qualified professionals to determine whether their child is a "child with a disability" within the meaning of the statute, and the law provides that parents are to be provided with a copy of the evaluation report on the child, the statutory provision states only that "a copy of the evaluation report and the determination of eligibility will be given to the parent." It does not state *when* the parents are to be provided with the evaluation report. This is a serious omission because the parents should have the evaluation report in hand when they meet with the evaluation team to make the determination of eligibility.[46]

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[43] *See* chap. 6, pp. 221–23.

[44] *See* chap. 6, pp. 223–27.

[45] *See* chap. 7, pp. 234–35.

Section 504 statutory and regulatory provisions remain unclear with respect to parental involvement in the education of students with disabilities. Under section 504, parental participation in student evaluation and placement is guaranteed only after the decisionmaking has occurred. Although parents are given the right to challenge a school's decisions relating to the identification, evaluation, or placement of a student with a disability, they have no right to participate in the school's initial decisionmaking. The statutory and regulation provisions of section 504 do not provide sufficient clarity on the role of parents as sources of information about their child and as participants in the development of their child's individual education program. As a result, section 504 does not provide guidance to States and local school districts on parental participation in decisions about the content of a child's education program and the appropriate placement setting for that child.[47]

Recommendation: In future reauthorizations, Congress should modify the IDEA provision that requires schools to provide parents with a copy of the evaluation report on their child to include language explicitly stating that parents should receive the report before the determination of eligibility meeting begins. DOEd should modify section 504 regulations, as Congress has modified the IDEA, Part B, to clarify that parents should be one of the sources of information used in interpreting evaluation data and making placement decisions. DOEd, through the joint efforts of OCR and OSEP, should collaborate with school systems to create standard communication strategies and methods for informing and notifying parents about teacher conferences, IEP meetings, and other hearings. The communication strategies should be flexible enough to meet the needs of the parents within the local communities or school districts. The communication strategies also should provide school districts with a self-evaluation feedback mechanism that will assist in assessing the effectiveness of the process. School districts should develop training materials and conduct workshops for parents designed to improve and encourage their participation at all stages of the special education process, particularly the IEP conference. The goal of the communication strategy should be to establish and treat parents as equal participants in the IEP process. To increase the level of parental participation at IEP conferences and meetings, both Federal and State offices should establish incentive programs for local school districts based on annual increases in parental participation and students' achievement levels.

Extent of Parental Involvement

Finding: Although educational research indicates the importance of parental involvement in the education of children with disabilities, the extent of parental involvement in their child's special educational program varies dramatically from district to district. The Commission's review of the current literature indicates various barriers to parental involvement, including State and local government discretion, an absence of sufficient communication mechanisms, problems with interpersonal dynamics between educators and parents, parents' lack of understanding about their legal rights, poor teacher attitudes about parental involvement, and inadequate teacher preparation. Moreover, several studies reveal that the involvement of minority parents in their child's special education program is lower than that of their white counterparts. Although it is argued that the low level of minority parent participation may be caused in part by apathy in their child's education, studies indicate that minority parents feel that some of their cultural and social needs are not addressed in special education. Often, these parents view education and medical professionals with "suspicion and skepticism."[48]

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[46] *See* chap. 7, pp. 254–55.

[47] *See* chap. 7, pp. 234–36.

Recommendation: DOEd, through the joint efforts of OCR and OSEP and in collaboration with State and local educational agencies, should organize and convene conferences or hearings on issues relating to parental involvement in various regions across the country. These conferences should include seminars and workshops with presentations by educational scholars; education practitioners; representatives of educational, civil rights, and disabilities advocacy groups and organizations; and, most importantly, parents themselves.

The Commission strongly recommends that DOEd, again through the joint efforts of OCR and OSEP, should encourage actively the participation of parent and community groups, organizations, and individual parents in all conferences or hearings that may be held relating to educational issues. The recommended hearings or conferences should result in the development of reports with specific findings and recommendations. These findings and recommendations should include formal and structured evaluative measures to assess regularly the quality of a school district's parental involvement activities. These evaluation measures should report on the level and quality of participation by parents of children with disabilities; and the types of educational settings that require parental participation, such as evaluation conferences, placement meetings, interviews, and IEP conferences. DOEd should then disseminate the reports to State and local educational agencies and to parent and community groups and organizations, and individual parents of students with disabilities.

In addition, DOEd should work with schools in developing "marketing" strategies that effectively capture and retain community support. In conducting this effort, DOEd should work with schools to obtain free media coverage, cable access programs and advertisements, and public service announcements that will keep all local stakeholders informed of school events and achievements. DOEd also should assist schools in developing hands-on guidance materials that address issues, such as parent-teacher conferences, notification letters, updates and progress reports for parents, and "ready-to-use" items for principals to send home to parents.

OCR should initiate dialogues and develop partnerships with teacher accreditation agencies and undergraduate teacher training programs for the purpose of proposing two new curricular elements in the teacher training curriculum: (a) civil rights laws and policies affecting children with disabilities, and (b) skill development in working with parents as educational partners. The focus in both courses of study should be to develop the ability of teachers to communicate important information more effectively to all parents of children with disabilities.

OCR and OSEP should develop a national strategic plan for addressing the unique challenges, needs, and problems of minority and low-income parents of children with disabilities. This strategic plan should focus on at least five aspects of this problem: (1) identifying the barriers faced by these parents; (2) developing an understanding among school personnel of the cultural factors that shape the behaviors and attitudes of parents; (3) developing specific strategies for raising the level and quality of participation of minority and low-income parents in their child's education; (4) developing research studies and investigations for purposes of identifying the specific needs and concerns of minority and low-income parents of children with disabilities; and (5) using the findings of these studies to develop innovative and effective practices for improving the participation of minority and low-income parents in their child's education.

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[48] *See* chap. 7, pp. 255–57.

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Parental Involvement: OCR's Implementation, Compliance, and Enforcement Efforts Under Section 504

Finding: OCR has not provided formal clarification on parent-related issues through policy interpretation or memoranda. OCR has adopted a stance of providing outreach, education, and technical assistance and of more vigorous enforcement of present civil rights laws and policies applicable to students with disabilities on parental involvement in its compliance activities by developing strategic goals relating to parental involvement, collaborating with community groups, and consulting with parent groups during compliance reviews and complaint investigations. In addition, when OCR investigates a complaint filed by parents alleging that the school district developed an education program or made a placement decision for the student without consulting the parents, OCR advises the school district to use the parents as one source for developing the education program and deciding the placement for the student.[49]

Recommendation: OCR should continue and enhance its outreach, education, and technical assistance and provide more vigorous enforcement of present civil rights laws and policies applicable to students with disabilities relating to parental involvement. In addition, OCR should identify and provide listings and explanations of the specific roles which parents might play in evaluation and placement decisions. OCR should propose that school districts develop self-monitoring instruments in collaboration with OCR regional offices and State educational agencies. The purposes of such self-monitoring instruments would include assessing the extent to which IEP meetings are conducted in accordance with section 504 and IDEA regulations. OCR should propose that these instruments contain such elements as appropriate methods of scheduling IEP meetings; the provision of transportation for parents; access to records of meetings; and the distribution of technical assistance materials. In addition, OCR should issue guidance requiring school districts to designate parents as official "team members" or participants in any decisionmaking process involving the child's educational placement. Finally, OCR should continue to provide outreach, education, and technical assistance and more vigorous enforcement of present civil rights laws and policies applicable to students with disabilities, resolution agreements, and other remedial goals which are viable strategies for enhancing parental involvement in the education of children with disabilities. OCR should continue to evaluate closely the success of these efforts for the purposes of future evaluation and development.

In addition, OCR should launch an education campaign targeted at school districts, parents, and students with disabilities regarding the rights of students with disabilities under section 504 and other Federal laws. No student should leave the education system without a thorough understanding of his or her rights under the law. OCR should provide training to parents and students on how to file section 504 complaints, and OCR should prepare user-friendly printed material with instructions for filing section 504 complaints with OCR.

Chapter 8. Teachers, Facilities, and Other Resources

Training and Certification of Special Education Teachers

Finding: There have been several concerns about the preparation and certification of special education teachers. One basic concern is that special education teachers are not receiving the training they need to instruct students with disabilities effectively. A second concern is that training and certification often do not match the realities of teaching. For example, some States award certification endorsements to teachers for different categories of students, even though the teachers may instruct students having a variety of different disabilities. Other States award noncategorical certificates, even though the teacher may work in a school that creates categorical disability programs. No consensus exists between and among the educational institutions that train special education teachers, the State education agencies that develop certification requirements, and the special education teaching professional generally. As a consequence, teachers may be instructing students whose disability-types they were not certified to teach, or they may be instructing a class for a specific disability-type when they did not receive specialized training or certification to instruct students with those types of disabilities. Section 504 specifies no Federal requirements for the certification of teachers of persons with disabilities. In at least one case letter, OCR has noted that "[a]n appropriate education includes the opportunity for handicapped students to receive instruction services from a *certified* teacher." In other cases, however, OCR has not found the lack of a formal certification for the particular disability a *per se* violation of section 504. It has approached each case individually based on the specific facts and circumstances. Where a teacher has had some specialized training, although no formal certification, for the particular disability type, OCR usually has determined the school district to be in compliance with section 504. Where a State has permitted teachers who are not formally certified to teach students with disabilities under waivers or temporary certificates, OCR generally has not found a violation of section 504 as long as the teacher meets the State standards. OCR's approach in analyzing State teacher training policies and standards has been to ensure that there is some mechanism to assure teacher competence. Where the State standard has required minimum criteria, such as possession of a bachelor's degrees and completion of certain minimum hours of graduate course work in a specialized area, OCR has found the State standards in compliance with section 504. The lack of a consistent, formal standard of compliance on teacher training, however, makes it unclear what approaches OCR has and generally will follow on teacher training issues.[50]

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[49] *See* chap. 7, pp. 263–66.

Recommendation: DOEd should work in collaboration with State and local educational agencies to create national reform by developing uniform standards for special education teacher certification. These standards may be developed by holding public hearings or conferences with the purpose of developing appropriate findings and recommendations. These findings and recommendations then could be incorporated into the section 504 and IDEA regulations; OCR and OSEP policy guidance; and/or a formal compliance standard agreement among the States and the teaching profession on the minimum training/competency standards necessary to provide an appropriate education to students with disabilities.

The Commission strongly recommends the development of findings and recommendations, that might include model goals and objectives for special education training, based on expert knowledge of researchers and special education practitioners; a thorough examination of the validity of noncategorical certification; and the creation of new guidelines for State-developed certification standards. OCR itself might propose requirements under the section 504 regulation through the process of a Notice of Proposed Rulemaking and public hearings. Any requirements proposed by OCR must be of high standards informed by the comments of special education experts; uniformly appropriate for each disability category; and applied consistently by OCR in complaint investigations and compliance reviews. Existing variations in certification standards should be minimized and practiced within States and local school districts as exceptional and/or emergency situations. In addition, DOEd should work to build a strong collaborative partnership with local school districts, training institutions, and universities and colleges across the country to improve inservice staff development in special education instruction, curriculum development, and counseling. DOEd and OCR, specifically, also should work to develop a dialogue with education and civil rights advocacy organizations, independent education scholars, as well as education programs at colleges and universities on ways of strengthening teacher preparation programs for special education.

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[50] *See* chap. 8, pp. 269–81.

Finding: It remains unclear whether the practice in some States of granting noncategorical certification meets section 504 compliance standards. In the case of the State of Massachusetts, for example, certification is not awarded for particular disabilities. Instead, three broad certification categories are granted. These categories, although insuring generic competency in teaching children with disabilities, do not guarantee expertise in teaching specific disabilities.[51]

Recommendation: The Federal Government, working in partnership with States, local education agencies, and advocacy groups, should study the feasibility of continuing noncategorical teaching certification being practiced in various States. These States, in turn, should initiate internal audits of teachers who have such certification for the purpose of determining the kinds of teaching positions they currently should hold based on the specific disability needs present in the classrooms.

Teacher Allocation

Finding: In the 1992–1993 school year, 7,075 additional full-time special education teachers were needed to instruct students with learning disabilities; 3,011 additional full-time special education teachers were needed to instruct students with mental retardation; 4,556 additional full-time special education teachers were needed to instruct students with emotional disturbance; 216 additional full-time special education teachers are needed to teach students with other health impairments, which may include students with behavior disorders; and 6,036 additional full-time special education teachers were needed to teach classes that serve students with varying disabilities. Various studies show that the impact of the special education personnel shortage is most severe in rural and urban school districts and for teachers trained to instruct students with low incidence disabilities, such as emotional disturbance and severe, multiple disabilities.[52]

The section 504 regulations do not set forth requirements on student to teacher/aide ratios or the maximum number of students with disabilities that one teacher may instruct at a time. OCR has not created a formal policy to address student to teacher/aide ratios under section 504. In a 1994 case letter, however, it noted that "the regulations implicitly presume that the number of students with disabilities that can be instructed by one teacher at one time must be reasonable."[53]

Because of the lack of formal policy on teacher/staff allocation, OCR's analytical approach and compliance standards were examined through a review of case letters dealing with teacher/staff allocation issues. In its complaint investigations and compliance reviews, OCR has looked to State education and local school district policies as guidelines on teacher/staff allocation. However, its analysis for determining section 504 compliance primarily has focused on identifying (1) what teacher(s) and other staff are necessary to provide the student with a free appropriate public education as required by 34 C.F.R. 104.33(a)&(b), and (2) whether such teacher(s) and staff were provided. Where the school district has developed an IEP for the student, OCR has considered whether a school district provided the necessary teachers and other staff to implement the student's IEP. Therefore, even where a school district has met a State's minimum requirements for the teacher/aide to student ratio, there have been circumstances where OCR found that the district did not satisfy the section 504 requirement to provide each student with a free appropriate public education.[54]

Recommendation: Despite recent increases in the number of people entering the special education field, State and local educational agencies continue to experience a severe shortage in special education teachers. Congress and DOEd should assist State and local educational agencies to address this problem by seeking to develop incentive programs targeted to various individuals such as college students, and various groups, organizations, and institutions such as disabilities advocacy groups and universities, who may have a stake in this field. For example, in the case of State educational agencies (including institutions of higher education), Congress and DOEd could introduce funding incentives that would stimulate the recruitment and development of special education professionals. For local school districts, DOEd could assist in the creation of recruitment and retention programs to encourage experienced special education teachers to remain in the field. For localities having the most urgent need (rural and/or urban), Congress and DOEd should seek to assist local educational agencies by providing strong recruitment incentives including supplemental incentives such as further education or other financial compensation to potential teacher candidates. In the case of advocacy groups, for example, DOEd could work in collaboration to develop recruitment strategies in this field including media presentations and public affairs campaign efforts.

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[51] *See* chap. 8, pp. 282–83.

[52] *See* chap. 8, p. 275.

[53] *See* chap. 8, p. 283.

[54] *See* chap. 8, pp. 283–84.

In addition, OCR should investigate in detail the impact of student/teacher ratios on the educational development and progress of students with disabilities and teaching personnel allocations through examining various correlates, e.g., type of disability, teacher credentials, school district expenditures, and regular vs. special education programs. Additional studies should be made by OCR and/or OSEP and OERI on the relationships between teacher shortages and certification practices and procedures. The results of such studies could yield valuable information for creating policies, regulations, or standards relating to teacher allocations and resources for special education programs.

Regular Education Teacher Training: OCR's Implementation, Compliance, and Enforcement Efforts Under Section 504

Finding: OCR's investigative approach under section 504 has focused on ensuring that special education teachers are trained and certified to instruct persons with the disability in question. According to OCR, "[t]o date, OCR has not had to address this issue of teacher certification in a 'team teaching' situation," and OCR has not provided policy guidance on this issue. OCR has noted that it "does not want to discourage innovative teaching techniques, but [it] will have to examine teacher certification issues, such as what will it mean . . . if schools teach students with learning disabilities in the same classroom with students labelled as mentally retarded." Despite the lack of OCR policy guidance on teacher training, some education organizations and educators have recognized the importance of offering training to regular education teachers to prepare them for instructing students with disabilities in the regular class. For example, some school districts hire new teachers who have prior knowledge of working with diverse learners, or they obtain consultants to discuss classroom management techniques, such as behavior modification and cooperative learning, a strategy for teaching a diverse group of learners. With the changing dynamics in classrooms and the promotion of more integrated environments for students with and without disabilities, it will be increasingly necessary for OCR to clarify section 504 compliance obligations on teacher training.[55]

Recommendation: DOEd, represented by OCR, OSERS, and OERI, should conduct conferences or public hearings to discuss regular education teacher training relative to team teaching and the transitioning of students with disabilities from special education programs to regular education programs. Such conferences or hearings should include input from as broad a range within the education community as possible, e.g., representatives of State and local educational agencies from a variety of regions across the country; educational scholars, policymakers, researchers, and teachers. The Commission recommends that in any findings and recommendations OCR might issue, whether in the form of a revised section 504 regulation, appendix, policy guidance, or promising practices manual, that OCR identify and explore the potential of practices, such as hiring new teachers who have prior knowledge of working with diverse learners or obtaining consultants to discuss classroom management techniques such as behavior modification and cooperative learning. In addition, OCR should clarify section 504 compliance obligations on teacher training.

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[55] *See* chap. 8, pp. 285–87.

Provision of Appropriate and Comparable Facilities, Activities, and Services

Finding: Although OCR's routine practice has been to compare the facilities and resources provided to students with disabilities with those provided to nondisabled students, OCR has issued no formal policy or standard outlining the number or kind of "other facilities" which OCR investigators should examine. The section 504 regulations do not clarify whether OCR investigators should compare the "identified facilities" to *all* other facilities operated by the school district recipient, a sample of the best facilities in the school district, or a sample that considers the best and worst facilities in the district. The condition of facilities can vary considerably in some school districts. Therefore, when determining whether a school district has provided comparable facilities to students with disabilities, it is useful for investigators to know whether to focus on the best facilities and resources that the district has provided its students, some average accounting for the best and worst facilities in the district, or a different standard.[56]

Recommendation: Within the spirit of honoring the autonomy of local educators in their decisionmaking about material and equipment used in educating children with disabilities, the Federal Government, State agencies, and local school districts should provide policy guidance for evaluating the appropriateness of material and equipment. This policy guidance should address such factors as use of comparability measures (i.e., similarity of resources for children without disabilities), specific needs of the student (i.e. based on the child's IEP), and past effectiveness in educating other children with disabilities.

Comparable Facilities

Finding: OCR has not created a formal standard or guideline in determining what kind or number of facilities should be used as the comparison for the facilities identified for use by students with disabilities. In one school district, the quality and type of facilities provided to students without disabilities can vary. There is no indication whether OCR adopts a policy of comparing the facilities designated for used by students with disabilities to a sample of the facilities provided nondisabled students, all other facilities in the school district, an average of the best and worst facilities in the district, or some other standard. This issue is particularly relevant with the increasing nationwide reports of overcrowded schools. In many schools, even the regular education classes and programs for students without disabilities are being assigned to alternative locations, such as teacher's lounges and storage closets. With such problems facing schools, it is unclear whether the facilities provided to students with disabilities should be measured against an increasingly lower standard affecting the schools overall.[57]

Recommendation: OCR should create a formal standard or guideline for determining what kind or number of facilities to use as the comparison for the facilities identified for use by students with disabilities. OCR should develop such a standard or guideline with the input of special educators and policymakers at the State and local levels and OCR regional office staff. In developing a formal guideline for defining "comparable facilities" that will help to ensure nondiscrimination in compliance with section 504 and equal educational opportunities for students with disabilities, OCR should identify the most appropriate standard from a remedial perspective. For example, one potentially effective means of developing this guideline might be to use a standard that seeks to provide the student with a disability the educational facilities and resources that student would enjoy in his or her school if he or she did not have a disability. Alternatively, OCR should explore adopting a policy based on other possible standards such as: a comparison of the facilities designated for use by students with disabilities to a sample of the facilities provided nondisabled students nationwide, a comparison with all other facilities in the school district, or the use of an average of the best and worst facilities in the district.

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[56] *See* chap. 8, pp. 291–92.

[57] *See* chap. 8, p. 292.

Technology in the Special Education Classroom

Finding: OCR has not included any specific mention of technological facilities such as computers or other high-tech learning tools in its section 504 regulation. OCR also has not issued any policy guidance addressing this subject. However, the section 504 regulation does: (1) require schools to provide regular or special education and related aids and services designed to meet the individual needs of students with disabilities as adequately as students without disabilities, and (2) require that facilities, activities, and services identified as being for persons with disabilities be comparable to the recipient's other facilities, activities, and resources.[58]

In its enforcement analysis, as observed in a review of case letters, OCR has addressed issues involving technology-related facilities in the classroom. For example, in at least one case, OCR has investigated a complainant's allegation that a classroom for a student identified as mentally retarded was not properly equipped because it did not provide computers and appropriate software programs. OCR did not find a violation in this case because, although records revealed the student's parent did request this equipment, "[t]he student's education program does not specifically require these items as part of her instruction. The student's educational program further stipulated that her disability does significantly interfere with her ability to meet regular academic mastery levels for computer literacy." On the basis of this information, OCR determined that "the evidence is insufficient to support this allegation." These brief statements appear to reflect the extent of OCR's investigation and analysis into the matter. OCR does not appear to have questioned the school district's actions with respect to the student's educational program nor does it appear that OCR attempted to determine whether the student could have benefited from the use of a computer or the appropriate software programs. This discussion of the student's educational program as it relates to his rights under the section 504 regulation seems a wholly different approach than its approach in other cases.[59]

Recommendation: Congress and DOEd should continue to provide leadership for educators across the country in promoting the application of technology for education purposes. Federal initiatives, whether in the form of legislation or departmental regulations, should continue to expand and intensify the use of assistive technologies for students with disabilities. In accomplishing this goal, DOEd should work in collaboration with State and local educational agencies to promote and sustain partnerships between private sector technology businesses, institutions of higher education, and local school districts to advance the use of technology in educating students with disabilities. OCR should issue policy guidance to ensure that school districts recognize the importance of technology in the classroom, as well as the importance of addressing the needs of all students. In particular, policy guidance addressing the analytical approach undertaken in cases involving "related aids and services" as well as a discussion of specific kinds of aids and services such as high tech equipment as it relates to equal educational opportunity and nondiscrimination will be a useful tool for OCR investigative staff. Finally, OCR also should adopt strategies to increase outreach, education, and technical assistance and to provide more vigorous enforcement of present civil rights laws and policies applicable to students with disabilities, to further assist special educators and parents in the vigorous use of technology, particularly computers, as a tool for learning in the special education classroom.

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[58] *See* chap. 8, pp. 298–99.

[59] *See* chap. 8, pp. 317–18.

Costs of Educating Students with Disabilities

Finding: An issue that has been the source of major debate involving the provision of facilities and resources to students with disabilities is the cost associated with educating students with disabilities. The dilemma for public schools systems facing increased costs for special education and limited financial resources has prompted several debates and concerns. It has led to characterizations and criticisms of the IDEA as an unfunded Federal mandate. It has generated concerns that the Federal Government has not provided enough funding for the education of students with disabilities, and it has led to calls for increased Federal funding for the education of children and youth with disabilities. In enacting the IDEA in the 1970s, the Federal Government committed to provide financial assistance to fund the provision of free appropriate public education called for in the IDEA.

Prior to the enactment of the IDEA Amendments of 1997, the IDEA Part B operated under a funding formula based on a "flat" reimbursement—an equal amount was provided for each student enrolled in special education regardless of the type, cost, or duration of services. Despite congressional authorization to fund the excess costs of special education and related services up to 40 percent, Federal funding for the IDEA never approached that level. With the enactment of the IDEA Amendments of 1997, Congress changed the IDEA's funding formula to remove the direct relationship that existed previously between the amount of Federal funding received under Part B of the IDEA and the number of students placed in special education. The new law retains the child count-based formula used under the IDEA of 1990 until the appropriation for Part B of the IDEA reaches $4,924,672,200. This threshold will trigger a change in the funding formula for distributing funds to States. Yearly child counts based on disability no longer will determine a State's funding allotment.

The change to the new formula will be triggered once Federal funding reaches the targeted threshold of approximately $4.9 billion. However, fiscal year 1997 appropriations for the IDEA Part B Grants to States program (approximately $3.1 billion) fall far short of the threshold. Given the current climate of budget cutting, it does not seem likely that the $4.9 billion threshold appropriation level will be reached anytime soon. Furthermore, when it does take effect, it only will be amounts above this threshold that will be allocated according to the new funding formula. Thus, although the change in the funding formula may have beneficial results, it probably will not reach children in schools in the near future.

There remains a major dilemma surrounding the costs issue. This dilemma also has aroused the concern that school systems are hindered in efforts to meet other initiatives. For example, there are reports that some schools are deterred from providing full support and placement for students with disabilities in the regular class because they perceive extraordinary increases in cost for regular class placements, and they consider it impossible to provide supplemental services to students with disabilities in regular classes. Finally, as public schools have provided individualized services to students with disabilities, sometimes at extraordinary costs, there has been criticism that students with disabilities are receiving a better education than students without disabilities and that the educational services provided to nondisabled students are being compromised to do so.[60]

Recommendation: As required by statute, Congress should fulfill its commitment to meet at least 40 percent of the excess costs for States to provide special education and related services to students with disabilities. DOEd should play a more active role in assisting States and local education agencies to seek creative solutions to meeting the costs of special education and related services for students with disabilities. DOEd also, through the joint efforts of OCR and OSEP, must work to ensure that States and local educational agencies are not "scared away" from providing appropriate education services to students with disabilities out of a perception that such services are impossible to afford. DOEd should work in collaboration with State and local educational agencies to conduct the necessary budget and financial exercises to determine the availability of State and local funding for educational services for students with disabilities. DOEd should assist States and local educational agencies by providing appropriate financial consulting services and other necessary personnel and resources to develop State and local financial plans that can ensure a free appropriate public education for each student with a disability. DOEd should also assist in providing any other necessary budget-related services such as collecting statistical data; conducting fiscal surveys and performing other statistical analysis on the availability of funds for appropriate education services for students with disabilities. Where such analyses and studies reveal that a State or local educational agency is operating under an erroneous perception that funds are unavailable, it is crucial that DOEd work to ensure, through technical assistance efforts, that the State or local educational agency efficiently distributes its financial resources across programs and services for both students with disabilities and nondisabled students. Where DOEd finds that State or local educational agencies cannot support the financial burden of providing appropriate educational services to its students with disabilities, DOEd should assist States and local educational agencies in seeking creative solutions such as board of education supported proposals to introduce new tax incentive legislation at the State or even local level. Regardless of the findings of such studies, however, OCR should continue to maintain its strict stance on compliance with section 504 regulations.

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[60] *See* chap. 8, pp. 318–20.

Lack of Resources or Costs as a Defense: OCR's Implementation, Compliance, and Enforcement Efforts Under Section 504

Finding: Another question that has been raised about cost issues is OCR's approach to school districts that contend they lack the resources or means to come into compliance with section 504 after OCR has identified areas of noncompliance. OCR has taken a strict approach to the schools' obligations under section 504. As a matter of policy and practice, OCR does not permit school districts to avoid compliance with the section 504 regulation requirements when they contend they do not have sufficient resources to comply. For example, in a recent case, a school district claimed that it could not find any occupational therapists to serve the district, and OCR rejected the district's defense that it used its "best efforts" to comply with OCR's directive.[61]

Recommendation: OCR should continue to maintain its strict approach to the cost defense and its position that a lack of financial resources cannot excuse a school system's obligation to ensure nondiscrimination in its program. In addition, OCR should continue to work with school districts in devising remedies sensitive to the financial limitations of schools. OCR should utilize all of its available resources to ensure that financially strapped school districts can meet their civil rights compliance obligations.

Chapter 9. Eliminating Barriers, Providing Access, and Maximizing Student Potential

Eliminating Barriers—Labelling

Finding: The practice of identifying children as having a disability has long been a feature of special education. Although identification is critical for ensuring that each child identified with a disability is considered for appropriate educational services, the identification or "labeling" of a child as having a disability can nonetheless have severe negative consequences. Issues associated with labeling of students with disabilities have been a major cause for concern in the special education community. The term "labeling" itself has come to have a negative connotation. Concerns relating to labeling are noted in various reports, research studies, practices of educators, and viewpoints held by parents. One of the fundamental complexities associated with labeling is that, in some cases, labeling of students is necessary for providing students with appropriate educational services and for providing basic data for educational research aimed at improving educational practices for persons with disabilities. On the other hand, critics of labeling view it as negative and damaging for students identified, or "labeled," as having a disability. For instance, a 1995 National Council on Disability report found that parents of students with disabilities had mixed feelings about labeling, some fearing that the process of labeling their child would lower schools' expectations of the child and result in limited educational opportunities, or that the labeling would have a stigmatizing effect on the child. However, some parents considered labeling necessary to ensure that their children receive the special educational support they need.

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[61] *See* chap. 8, pp. 320–22.

In addition to the negative effects labeling may have on students with disabilities, the scientific and educational underpinnings of labeling are questionable. Many researchers and disability advocates have criticized labeling as being a subjective process with little scientific foundation. Some maintain that the process of labeling a student often is arbitrary depending on a number of factors, such as teachers' expectations and attitudes, cultural norms, and student behaviors.

Most States require school districts to label children before the State will reimburse the school districts for providing services. However, at least one State eliminated the labeling requirement because the classification "had a stigmatizing effect." Moreover, there has been increasing support for noncategorical systems of special education due, in part, to concerns about the effects of labeling on students.

There have been some efforts to address the labeling issue. For example, some States have changed the way they identify students as eligible for special education. For example, "noncategorical" States identify students by service need instead of disability classification.[62]

With the IDEA Amendments Act of 1997, Congress has sought to address the issue of labeling of students by increasing the age at which a school classifies a "developmental delay" within a specific disability category for purposes of service eligibility under the act from age 5 to age 9. According to the legislative history of the statute, Congress' intent with this change in the law was to address the problem of having the disability category rather than the child's individual educational needs driving the development of the child's IEP and educational placement.[63]

Recommendation: Congress and DOEd, through the joint efforts of OCR, OSEP, and OERI, should conduct public hearings for the purpose of making findings and recommendations to revise statutory provisions in the IDEA and Department of Education regulations relating to disabilities categories and to issue reports and policy guidance that reflect the many calls for reform on the subject of labeling as an educational practice. Although some form of child classification may be necessary to receive special education services, there is very little research to support the existing classification or placement labeling system. As a result, congressional and U.S. Department of Education hearings should focus on various suggestions for replacing the current labeling system with a method that labels children by the type of instruction needed by the child. The hearings also should consider the implications of educational research suggesting that, given rapidly increasing cultural diversity in our society, more emphasis should be placed on the potential impact of cross-cultural misunderstanding in the labeling of special education students.

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[62] *See* chap. 9, pp. 323–24.

[63] *See* chap. 9, pp. 323–24.

The hearings should consider ways of reducing the negative effects of labeling to the extent that students continue to be labeled. Educators must be aware of the limitations of techniques and assessment tools that create mislabels, especially for racial and ethnic minority, and language minority students, and the potential stigma that students must face beyond their educational years. The use of labels warrants a full understanding of the factors that make it effective to those children who need special services.

All of these important research findings should be publicized by Congress and DOEd in public hearings in Washington and throughout the United States. The new statutory and regulatory provisions, and policy guidance generated from these reports can be disseminated to the State and local educational agencies, local school districts and local communities to broaden the awareness of the negative effects of labeling children with disabilities. In addition, State and local educational agencies should work to ensure continued benefits from reforms on labeling issues through curriculum for elementary and middle school students; teacher-training institutions; and inservice training workshops for both regular and special education teachers.

Impact of Labeling on Students

Finding: Labels imposed by health professionals, teachers and other school officials, and nondisabled children create negative feelings for children in special education.[64] Children who are labeled carry their educational experiences into adulthood. For example, feelings of inferiority, isolation, and separation from "nondisabled" persons, make it difficult for many of them to adjust to a world outside education. Many students labeled as disabled usually have "problematic" relationships with educational and professional authorities, as well as negative interactions with teachers and students without disabilities in the educational process. These experiences cause low self-esteem that extends beyond the classroom environment and affects their social and economic advancement.[65]

Recommendation: DOEd should work in collaboration with State and local educational agencies and colleges of education across the country to provide better understanding of the phenomena associated with labeling in a child's early education years. Educators, school administrators, and health professionals should be encouraged to make greater efforts to mitigate the harmful effects of labeling and assist children with disabilities to redefine their identities in a manner that may allow them to combat the aversion, separation, and discrimination that they face as adults.

In addition to research, broader public awareness about the current prevalence and use of labeling in special education is needed. Professional education organizations, State agencies, education scholars, and parent organizations should implement research studies on labeling and issue factfinding reports that could lead to policies and legislation to improve the current classification system.

Impact of Labeling on Minority Parents

Finding: Labeling also has a negative impact on parents or may lead them to underestimate their child's potential or self-concept. A few studies on minority parents' views of labels have found that minority parents resist labeling. One such study states that many of these parents reject a "global definition" of their child that is based on only a part of their identity. Minority parents' parameters of what is normal and acceptable for their children tends to be much broader than the labels used at schools. Other research finds that African American and Hispanic parents dispute the appropriateness of labels for their children. For the most part, research finds that minority parents tend to be more concerned about the overclassification and special education placement of their children, protection from the "stigma" associated with labeling, and the need to hide their child's disability from family members.[66]

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[64] *See* chap. 9, pp. 326–27.

[65] *See* chap. 9, pp. 324–29.

Recommendation: Additional research should be conducted on the impact of labeling on parents, particularly on minority parents. Parent training programs and materials should be developed with the joint cooperation of advocacy groups, educational organizations, State educational agencies, and the Federal Government. The focus of such training should address appropriate labels, the proper uses for labels, and methods for teaching children with disabilities to cope with their labels. The issue of the effects of labeling on parents should also be a central subject in the coursework of teacher training programs and in-house staff development.

More extensive research should be conducted on the role of labeling in special education and its impact on minority group parents. The data from such research should be used as a foundation for developing training programs specially geared to minority parents and educators. The results of these data should also be used by the Office for Civil Rights in the subsequent formulation of policy guidance.

Labeling: Federal Law and Policy Under the IDEA and OCR's Section 504 Implementation, Compliance and Enforcement Efforts

Finding: In enacting the provisions of the Education for All Handicapped Children Act, Congress focused on the notion that each child is unique. Consequently, a student with disabilities should not receive an education based on the category of disability, but based on individual need. Section 504 regulations follow the same fundamental notion of individuality. The regulations define an "appropriate education" as "the provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met."

In addition, OSEP clarified that Part B of the IDEA "does not require States to label children . . . [t]he Department has no objection to a State's use of categories which differ from those specified in Part B or, if it elects, the use of a noncategorical approach so long as those children eligible under Part B are appropriately identified and served." The joint response offered by OSEP and OCR noted that IDEA Part B and Section 504 provide a guarantee of a free appropriate public education (FAPE), as defined respectively under each statute; they do not create an entitlement to a particular label. Further, the focus on the individual educational needs of each child "would preclude 'shoehorning' children into inappropriate placements." The policy letter implies that it is incorrect to assume that either IDEA Part B or section 504 require a particular child to accept a particular label to be eligible for and receive FAPE.

Beyond that policy letter, OCR has approached labeling issues in a variety of contexts. First, because incorrect classification of students as disabled can lead to the inappropriate labeling of students who do not have disabilities, OCR has placed particular focus on school districts' referral, evaluation, and placement practices. In particular, through outreach, education, and technical assistance, and through vigorous enforcement of present civil rights laws and policies applicable to students with disabilities, OCR has targeted misclassification problems for minority students giving this issue priority focus. OCR has focused compliance reviews on the issue of minority students and special education. In addition, in 1995, it produced a comprehensive policy entitled "Minority Students and Special Education." This policy discusses the legal approaches to issues surrounding disproportionate representation in special education.

In a section entitled, "Civil Rights Implications of Minority Students and Special Education," the policy provides some history and background concerning minority students and special education as a critical civil rights issue. In that section, OCR notes that it "does not view special education itself as harmful or inappropriate for students with disabilities who need special education . . . Indeed, special education often provides the appropriate education for those students whose disabilities inhibit their learning in an unmodified, regular educational environment."[67]

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[66] *See* chap. 9, pp. 329–31.

Recommendation: OCR should develop policy guidance addressing the issues relating to the negative effects and stigmatization that can occur for students with disabilities even when they are appropriately "labeled" or classified. OCR should continue to provide outreach, education, and technical assistance, and vigorous enforcement of present civil rights laws and policies applicable to students with disabilities, such as disseminating technical assistance materials and information on the educational and civil rights implications associated with labeling. OCR also should continue to work in concert with OSEP and OERI to initiate a nationwide campaign of outreach and education designed to inform people across the country about labeling and related issues. Such a campaign might include issuing educational and policy findings and recommendations on the equal educational opportunity barriers that can result from stigmatization of individuals with disabilities. Another important aspect of such a campaign would be conferences with seminars and workshops supporting additional research, OCR staff training and development, and publications that will clarify the complex issues surrounding labeling and classification.

Nonacademic Services and Extracurricular Activities: Educational Perspectives and Policy

Finding: Despite the benefits extracurricular activities can provide, education studies indicate that for students with the disabilities considered in this report, such activities are not always as accessible as they are for their peers in the regular education program. Congress and DOEd have recognized the importance of providing access to extracurricular activities for students with disabilities by incorporating provisions addressing this issue in education laws, regulations, and policies. For example, Federal law under section 504 requires that schools address extracurricular activities in meeting their obligations to students with disabilities. The section 504 regulations specify that a school system "shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities. . . . Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the [school], referrals to agencies which provide assistance to handicapped persons, and employment of students."

In addition research studies have found that students identified as having learning disabilities appear to be less involved in extracurricular activities as compared to their peers in the regular education program. However, their academic achievement and self esteem appear to benefit from participation in extracurricular activities.[68]

Recommendation: DOEd, through OCR and OSEP, and State and local education agencies should undertake further institutional efforts to ensure access to and promote participation of students with learning disabilities, behavioral disabilities, emotional disturbance, and mental retardation in extracurricular and other available social and recreational activities. Because this population long has represented a particularly high risk group for exclusion from such activities, the Office for Civil Rights should undertake further efforts to ensure that schools remain aware of the need to place special emphasis on the participation of students with disabilities in *all* of the activities that the regular education program has to offer. OCR should make nonacademic and extracurricular services a priority in its strategic plans and issue further policy guidance on these issues to ensure that schools are meeting both the letter and intent of their legal obligations under the section 504 statute and its regulations.

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[67] *See* chap 9, pp. 333–35.

[68] *See* chap 9., pp. 335–42.

Nonacademic Services and Extracurricular Activities: OCR's Implementation, Compliance, and Enforcement Efforts

Finding: The provision of reasonable accommodation to students with disabilities remains a focal point of unresolved compliance issues with respect to nonacademic services and extracurricular activities. For example, there remain problematic compliance issues relating to reasonable accommodation to ensure the participation of students with learning disabilities in interscholastic sports. The Federal courts are conflicted on the meaning of "reasonable accommodation" for participation in interscholastic sports. Specifically, the courts have reached differing conclusions in determining whether a specific eligibility requirement can be modified to provide reasonable accommodation.

Although the Federal courts have offered differing interpretations of the section 504 regulations on the issue of whether a program requirement such as an age eligibility rule can be waived as a reasonable accommodation, OCR has not attempted to resolve this controversy in its policy guidance or case letters. OCR follows the "case-by-case basis" relied on by the court in *Sandison.*[69]

Recommendation: Because OCR follows the "case-by-case basis" relied on by the court in *Sandison*, which held that a program requirement such as an age eligibility rule can be waived as a reasonable accommodation, OCR should refer to this case and its reasoning, as well as other important cases on reasonable accommodation under section 504 such as *Alexander v. Choate*, in a policy guidance that would address this issue.

OCR in its policy guidance or the section 504 regulation should attempt to resolve the controversy in the Federal courts over whether a program requirement such as an age eligibility rule can be waived as a reasonable accommodation. To the extent that OCR relies on a "case-by-case basis" approach similar to that adopted by the *Sandison* court, OCR should clarify this in its policy guidance.

Finally, to the extent that OCR is relying on Federal case law in its enforcement analysis relating to nonacademic services and extracurricular activities and/or reasonable accommodation, OCR should discuss these cases and their reasoning, as well as any other important cases that are informing its analysis on reasonable accommodation under section 504.

Finding: OCR has issued little policy guidance specifically addressing nonacademic services and extracurricular activities. Instead, OCR has fashioned its section 504 compliance standards with respect to the participation of students identified as having a disability, including students identified as having a learning disability, a behavioral disability, emotional disturbance, or mental retardation, in extracurricular activities and other nonacademic services mainly through "case-by-case" analyses developed in its case letters.[70]

Recommendation: OCR should develop its compliance standards relating to the provision of nonacademic services and extracurricular activities through policy guidance addressing specific issues. For example, OCR should enunciate more clearly drawn standards, perhaps employing specific fact patterns to provide helpful examples, in its policy guidance for what constitutes a "justification" for exclusion from participation for a student with a disability such that the school district should not be called upon under section 504 to provide the student with participation through accommodations. In other words, OCR should seek to better establish for its investigative staff and local school districts the scope and parameters of reasonable accommodation, specifically, the distinctions between reasonable and "unreasonable" accommodation.

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[69] *See* chap. 9, pp. 343–47.

[70] *See* chap. 9, pp. 346–47.

Transition Services: Educational Perspectives and Policy

Finding: In 1990, Congress added a provision on "transition services" to the IDEA's Part B grant program. This provision defines "transition services" as "a coordinated set of activities. . . which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation." Despite the development of important Federal initiatives by DOEd and in legislation such as the Americans with Disabilities Act and the IDEA, numerous studies on this issue indicate that large numbers of individuals with disabilities remain unemployed and socially isolated within their communities. Individuals with learning disabilities continue to experience higher rates and longer periods of unemployment, underemployment, or part-time employment than their peers who do not have disabilities. Frequent problems for students identified as having learning disabilities include minimal academic skills and vocational training; and difficulty in establishing social and interpersonal relationships, and carrying out independent living functions.

One study based on an examination of State policies has identified nine components for effective transition services policy making: 1) interagency planning and coordination at the local level; 2) involvement of adult service agencies prior to the youth leaving the child service system; 3) a process for identifying or planning transition for the child at an early age; 4) transition should be "automatic;" 5) include a variety of settings for transition should be identified; 6) a person or system must have responsibility for planning and delivering services; 7) parents and youth should be included in the planning and implementation of the transition process; 8) the development of an interdepartmental mechanism to plan and coordinate transition services, as well as resolve disputes; and 9) include transition services that created successful independent adult living. The study indicated that no current State policy encompasses all nine of the suggested ideals for transition.[71]

Recommendation: DOEd, through the concerted efforts of OCR and OSEP, and in collaboration with State and local educational agencies should develop collaborative efforts by students, parents, secondary and postsecondary education personnel, social service agencies, and other entities in pursuing successful transition strategies. Such efforts should, at a minimum, produce published information on best practices in transition services policy strategies and should be vigorously disseminated to all stakeholders in the special education community. All entities responsible for developing strategies to provide transition services should ensure that at least the nine components identified above are incorporated into the process.

Transition from the Resource Room to Regular Classroom

Finding: Several research studies have addressed issues relating to the transition of special education students from the resource room to the regular education classroom environment. These studies have found that the needs of students with disabilities often are not addressed in the regular classroom and have identified a number of equal educational opportunity barriers that often prevent a successful transition, including: 1) lack of adequate training for regular classroom teachers in serving students with learning disabilities, 2) the regular teachers' negative attitude towards transitioned students, 3) the teachers' attitude towards special education and the use of the resource room, 4) the inadequate preparation of the students with learning disabilities to be transitioned into the regular classroom, 5) the lack of communication between the resource room teacher and the regular teacher, and 6) inadequate inservice training for special education transition. Another study indicated that a barrier to successful transition from the resource room to the regular classroom was the lack of special assistance, such as tutoring assistance, provided to students making the transition.[72]

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[71] *See* chap. 9, pp. 347–52.

Recommendation: DOEd, through the concerted efforts of OCR and OSEP, and in cooperation with State educational agencies, should urge local school districts to broaden special education inservice training to include regular education teachers. The inclusion of regular education teachers in special education inservice training programs will serve to promote effective and improved communication between the regular classroom teacher and the resource room teacher, improve the regular classroom teachers' understanding of the special education program, and increase student accountability and academic performance.

Transition from High School to Postsecondary Education

Finding: In developing services and plans for the transition from high school to postsecondary education, educators must assist students with disabilities in undertaking a number of new and challenging initiatives. Research shows that a lower percentage of students with disabilities attend college and that students with disabilities tend to drop out of higher education institutions at a higher rate than students without disabilities, or tend to delay entrance to college as compared to students without disabilities.[73]

Recommendation: DOEd, through the concerted efforts of OCR, OSEP, and OERI, should develop reports, policy guidance, technical assistance materials, and other published information for dissemination by State and local school districts that strongly emphasize the importance of guidance on finding a postsecondary education program suitable for each student's unique needs and talents. Such information, whether in the form of reports, policy guidance, or other form, should focus closely on strategies for encouraging and preparing students with disabilities for attending college; enhancing the student's understanding of his or her disability, and the new role, responsibilities, needs and services college admission may require. In addition, such information should focus on one or more of the following transition components to ensure that the student will be successful in: 1) finding the appropriate college program including identifying and seeking admission to institutions that provide appropriate programs, services and accommodations, and ensuring that the students knows and is fully aware of his or her personal strengths, weaknesses, needs, and goals, as well as the environment he or she will be entering in the college setting; 2) understanding the concept of reasonable accommodation and related issues, such as identifying circumstance where it may be applied and understanding rights and responsibilities under the law; 3) possessing the ability to notify the institution of his or her needs and ensuring that he or she receives the appropriate services; and 4) establishing a personal support network with special educators, teachers, and counselors.

Transition from High School to Employment

Finding: Research findings show numerous problems encountered by students with various disabilities in their transition from public secondary education to adult life, particularly into the work environment. For the most part, these studies have identified employment for high school graduate students with disabilities as a desirable or successful transition.[74] However, research findings show numerous problems encountered by students with various disabilities in their transition from public secondary education to adult life, particularly into the employment environment. For example, some studies on the transition of students with serious emotional and behavioral disorders show that these youth often do not enroll in postsecondary education programs, experience a high rate of unemployment or underemployment and job dissatisfaction, a lack of success in employment settings, and receive little assistance from community agencies upon leaving public school.[75]

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[72] *See* chap. 9, pp. 352–54.

[73] *See* chap. 9, pp. 354–58.

[74] *See* chap. 9, pp. 358–59.

Recommendation: DOEd, through the concerted efforts of OCR, OSERS, and especially OERI, should develop and disseminate reports, technical assistance materials, and other published information containing data on successful strategies for providing transition services from secondary education to employment. Targeted areas for dissemination should include State and local educational agencies, civil rights and disabilities advocacy groups and educational organizations, and parent and community groups and organizations. In addition, DOEd should ensure that existing data on the impact of State, local and other initiatives on the transition of students with disabilities into the employment environment be disseminated. DOEd also should explore the possibility of working in conjunction with the Department of Labor on job training programs specifically for persons with disabilities.

Transition Services: OCR Implementation, Compliance, and Enforcement Procedures

Finding: In addressing schools' legal obligation to provide transition services for students identified as having a disability, OCR implements section 504 in part through its regulatory provisions. However, there are no provisions in the section 504 regulations that explicitly refer to the term "transition," although the regulations do mention such related issues as program accessibility in the context of entering postsecondary education programs. Thus, the section 504 regulations do not explicitly address whether students with disabilities have a right to transition services under section 504.

Case law rather than the regulations has helped to clarify the implementation of section 504. Furthermore, there is no OCR policy guidance addressing the transition of students identified as having a disability from high school to postsecondary education or the work world. The compliance standards on which OCR relies in enforcing section 504 largely are developed on a case-by-case analysis of issues relating to transition services. In conducting its enforcement activity to ensure that schools are meeting their legal obligations under section 504 to provide appropriate transition services for students with disabilities, OCR has addressed a relatively small number of transition-related issues. The failure of OCR to create policy guidance on the right to transition services under section 504 and the silence of the section 504 regulations on transition are likely to lead to inconsistent decisions by courts and by OCR. Therefore, the development of regulations and policies on this issue could improve OCR's compliance and enforcement efforts related to transition services.[76]

Recommendation: OCR should create policy guidance on the right to transition services under section 504 and in its section 504 regulations to prevent inconsistent decisions by courts and by OCR and to improve OCR's compliance and enforcement efforts related to transition services.

The Counselor's Role

Finding: Counselors can play a crucial role in the educational, social, psychological, and personal development of students identified as having mental retardation, a learning disability, emotional disturbance, or a behavioral disability. However, students with these disabilities are not being provided adequately with the counseling services they require. Studies have suggested a number of factors as reasons for this poor delivery system, including: (1) counselors who are ill-equipped to address the differing needs betwen students with these disabilities and regular education students, (2) a lack of time and resources, and (3) inadequate counselor training and education in these disabilities. Providing counseling services to students with these disabilities can require a great deal more time. Counseling students with these disabilities also may require other extra efforts such as parental consultation, collaborative efforts with special and regular education teachers, or communication with agencies and organizations outside of the school. Unduly high student-to-counselor ratios and the growing diversity in the overall student population can place additional demands on the counselor's time and resources.

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[75] *See* chap. 9, pp. 358–59.

[76] *See* chap 9, pp. 360–62.

Providing appropriate counseling services to students identified as having mental retardation, a learning disability, emotional disturbance, or a behavioral disability requires counselors who possess specialized knowledge, skills, and abilities. The counselor's ability to determine accurately the needs of each student is a crucial first step in developing a successful counseling relationship with that student. In addition, the counselor must possess knowledge of strategies that can adequately address the student's needs. The counselor also must possess the knowledge of legal requirements under section 504, the IDEA, and State laws and policies in providing counseling services that are nondiscriminatory to students with these disabilities. The counselor must possess the skills necessary to provide equal access to counseling services for regular education students and special education students. Finally, the counselor must be able to engage in effective communication with special education teachers who can assist counselors in delivering adequate services to students with disabilities.

The counselor's role in providing adequate transitional services is critical if students identified as having mental retardation, a learning disability, emotional disturbance, or a behavioral disability are to pursue a postsecondary education degree or secure full-time employment upon high school graduation. For instance, successful transition to postsecondary education requires that counselors establish effective relationships with adult services and community organizations. By identifying individual needs and fostering collaboration with adult and community service providers, counselors can assist students identified as having mental retardation, a learning disability, emotional disturbance, or a behavioral disability and their families with health care, employment training, skills development, financial planning, and other transitional services.

Another important role for the counselor is to address the needs of the families of students with disabilities, particularly the parents. The relationship between the counselor and the parents is often an important part of counseling services. The counselor's input may be relied on by parents in making important decisions such as determining what programs and services best meet the needs and abilities of the student.[77]

Recommendation: DOEd, through the concerted efforts of OCR, OSEP, and OERI, and in collaboration with State and local educational agencies should encourage and assist teacher training institutions, colleges, and universities in developing counseling and education curriculums that incorporate the theories and techniques of transitional counseling, specifically for students with a disability.

Counselors should serve as the primary resources for parents of students with disabilities and assist parents in obtaining information on requirements such as admission criteria for colleges and universities, vocational schools, and employment services.

Counseling Services: OCR's Implementation, Compliance, and Enforcement Efforts

Finding: Equal and nondiscriminatory counseling services are necessary for providing a free appropriate public education, and for maximizing the potential of students with mental retardation, learning disabilities, behavioral disabilities, or emotional disturbance. All students identified as having a disability are guaranteed counseling services as part of the section 504 regulation's nondiscrimination provisions. OCR has not drafted any recent policy guidance on counseling services under section 504. Furthermore, OCR case letters reviewed consistently fail to mention the counseling services provision at 104.37(b). This omission renders OCR's enforcement analysis with respect to counseling services less persuasive than it might otherwise be if OCR also had cited the counseling provision.

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[77] *See* chap 9, pp. 362–66.

However, OCR has issued technical assistance material on counseling services. One such technical assistance document discusses the requirements of guidance counselors under the implementing regulations for Title VI, Title IX, and section 504. This document emphasizes that equal and nondiscriminatory counseling services are necessary for providing a free appropriate public education to each student, and for maximizing the potential of students identified as having a disability.[78]

Recommendation: OCR should draft new policy guidance on the counseling services provision under section 504. This policy guidance should clarify OCR's enforcement analysis relating to the counseling provision at 104.37 by identifying some form of consistent standard on its application in the analysis employed by OCR staff conducting complaint and compliance investigations.

OCR should continue to develop technical assistance material relating to the provision of counseling services. OCR should ensure that its technical assistance information reflects current best practices for counseling services and programs offered in schools. This office should also work cooperatively with school counselor professional organizations and counselor training programs in universities for the purpose of developing both preservice and inservice training programs.

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[78] *See* chap. 9, pp. 366–67.

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